Retaliation in International Law

RETALIATION IN INTERNATIONAL LAW

Evelyn Speyer Colbert

KING'S CROWN PRESS
Columbia University, New York
1948

KING'S CROWN PRESS
is a subsidiary imprint of Columbia University Press established for the purpose of making certain scholarly material available at minimum cost. Toward that end, the publishers have adopted every reasonable economy except such as would interfere with a legible format. The work is presented substantially as submitted by the author, without the usual editorial and typographical attention of Columbia University Press.

PUBLISHED IN GREAT BRITAIN AND INDIA
BY GEOFFREY CUMBERLEGE, OXFORD UNIVERSITY PRESS
LONDON AND BOMBAY

MANUFACTURED IN THE UNITED STATES OF AMERICA

TO MY FATHER

Acknowledgements

THE AUTHOR wishes to express her gratitude to Professor Philip C. Jessup, who gave generously of his time and advice in the preparation of this book, and to Professors Joseph P. Chamberlain, Oliver J. Lissitzyn, and Arthur Nussbaum for their many valuable suggestions. The author is deeply indebted to her husband, James L. Colbert, for his unfailing assistance and encouragement.

E. S. C.

Contents

Table of Abbreviations

AJIL	American Journal of International Law
APC	Acts of the Privy Council of England
BYIL	British Yearbook of International Law
CCR	Calendar of the Close Rolls
CSP Dom	Calendar of the State Papers, Domestic
CSP Ven	Calendar of State Papers and Manuscripts Existing in the Archives and Collections of Venice
CPR	Calendar of the Patent Rolls
Foreign Relations of the U.S.	Papers Relating to the Foreign Relations of the U. S.
Rev. Droit Int.	Revue de Droit International et de Législation Comparée
RGDIP	Revue Générale de Droit International Public

Introduction

IT IS an admitted weakness of international law that it lacks the power of enforcement. States may observe the law of nations because legality promises greater ultimate advantages than illegality, or because public opinion is strongly weighted in favor of legality, or because they fear the reaction of other states to any illegalities they may desire to commit. Should they violate the law, however, there is no assurance that their violation will be checked or punished. It is this situation, of course, that has given rise to the familiar argument that international law has no real existence. Nevertheless, despite its weaknesses, its immaturity, and the frequency with which its tenets have been disregarded, the concept of an international community living under a law and acting by it is a strongly rooted one, strong enough at least to lead statesmen, whatever their policies, to seek to prove that international law supports the actions they undertake.

The existence of the doctrine of retaliation is a reflection both of the absence of law enforcing machinery in international law and of the desire of states to justify their acts by an appeal to the support of its tenets. On the one hand, it is a method by which one state may force another to cease its transgressions against the law. On the other, it provides justification on legal grounds for acts ordinarily illegal.

Retaliatory acts are of many kinds and may occur in time of peace or in time of war. They are extraordinary measures which, normally, would be unlawful. They have in common the fact that their legality is claimed to arise from their appropriateness as responses to the prior illegalities of another state, the original lawbreaker having refused to give satisfaction for its wrongs or to end its wrongful practices. Peacetime retaliation seeks from the state against which it is directed a recognition of the illegality of its actions through the compensation of those injured and the cessation by the state concerned

of its objectionable policies. War time retaliation seeks first to force the offending state to cease its illegal practices and secondly, to equalize the position of the belligerents by releasing the one from obedience to the law which the other has flouted.[1]

1. A note on terminology—Definitions of the three terms bearing on the subject herein considered, i.e. retaliation, retorsion, and reprisal, seem at times to be as various as the writers dealing with them. Ernest Nys in *Le Droit International: Les Principes, Les Théories, Les Faits* (Brussels, 1906), Vol. III, pp. 84, 85, quotes Despagnet to the effect that "La rétorsion . . . consiste à l'appliquer des mesures de rigueur à un État ou à ses nationaux, quand cet État applique lui-même à d'autres pays ou à leurs nationaux des mesures qui, sans constituer une violation des principes généraux du droit international ou de droits aquis par les traités, sont cependant trop durs ou même iniques." The same writer cites Heffter to the effect that "Par représailles on entend . . . toutes les mesures de fait dont un gouvernement se sert vis-à-vis d'un autre État, des sujets de ces derniers ou de leurs biens, dans le but de contraindre la puissance étrangère de faire encore droit sur les questions en litige ou d'en obtenir une juste satisfaction ou de se faire au besoin justice lui-même." Oppenheim in *International Law* (2nd Edition, Boston, 1912), Vol. II, pp. 36, 37, declares "Retorsion is the technical term for the retaliation of discourteous or unkind or unfair and inequitable acts by acts of the same or a similar kind. Retorsion has nothing to do with international delinquencies, as it is not a means of compulsion in the case of legal differences, but only in the case of certain political differences. The act which calls for retaliation is not an illegal act, on the contrary, it is an act that is within the competence of the doer . . . acts of retorsion are confined to acts which are not internationally illegal." The same writer defines reprisals as "the term applied to such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency." *Ibid.*, pp. 38, 39. Oppenheim follows W. E. Hall in confining retorsion to a response "to acts which it is within the strict right of a state to do." Reprisals, Hall states in *A Treatise on International Law* (4th Edition, London, 1895), "are resorted to when a specific wrong has been committed; and they consist in the seizure and confiscation of property belonging to the offending state or its subjects by way of compensation in value for the wrong; or in seizure of property or acts of violence directed against individuals with the object of compelling the state to grant redress; or, finally, in the suspension of the operation of treaties." According to A. E. Hindmarsh in *Force in Peace* (Cambridge, Mass., 1933), p. 58, "Public reprisals may . . . be defined as coercive measures taken by one state against another, without belligerent intent, in order to secure redress for, or to prevent recurrence of, acts or omissions which under international law constitute international delinquency." Charles Cheney Hyde, on the other hand, in *International Law* (Boston, 1945), Vol. II, p. 1662, declares "For sake of clearness, and for the purpose of preserving solid distinctions of both historical and etymological worth, it is deemed wise to confine the use of the term 'reprisals' to the act of taking or withholding of any form of property of a foreign State or its nationals, for the purpose of obtaining, di-

Private reprisals are noteworthy as the only type of retaliation that ever achieved any degree of uniformity. Based generally upon unpunished robbery and violence committed by the national of one state upon the national of another, private reprisals were authorized seizures of property belonging to subjects of the ruler who had failed to do justice. Such property to the amount of loss plus costs was seized either within the jurisdiction of the ruler whose subjects had been unable to secure justice, or on the high seas. Reprisals of this type were the subject of detailed regulations as early as the last decade of the thirteenth century and played an important part in international trade until the end of the seventeenth. For these four centuries, peace time retaliation was a weapon used for the most part to remedy the grievances of private men, was subject to fairly strict and uniform

rectly, or indirectly, reparation on account of the consequences of internationally illegal conduct for which redress has been refused." Hyde is followed in confining reprisals to property seizure by Grover Clark who declares in "The English Practice with Regard to Reprisals by Private Persons," 27 *AJIL* (1933), p. 694, "Speaking exactly, the only common characteristic of acts of reprisal and acts of retaliation is the use of force; the two kinds of acts differ fundamentally in their purposes. Retaliation involves the use of force to inflict an injury in return for an injury inflicted; reprisal involves the use of force to secure compensation for a loss by the taking of property." Hyde, like Westlake, applies the term retorsion broadly to cover ". . . the action taken by a State in order to compensate it for some damage suffered through the action of another State, or in order to deter the action complained of" and, like Westlake, uses the term to cover all such actions whether normally legal or normally illegal, *op. cit.*, Vol. II, pp. 1657, 1658. Westlake in *International Law* (2nd Edition, Cambridge, 1913), Part II, pp. 6, 7, adds ". . . retaliation . . . is often used in the wide sense of retorsion of any kind, but is perhaps more properly used only for that kind of retorsion in which the thing done in return is the same as that complained of . . . Thus in war, breaking towards an enemy the particular rule of civilized warfare which you accuse him of breaking would be retaliation while breaking another rule toward him would best be described as retorsion." *Ibid.*, pp. 6, 7.

Where authorities so eminent disagree so thoroughly, evasion would appear to be the better part of valor. The writer, accordingly, has used the word retaliation as a general term without reference to technical distinctions to cover the situation described in the text above and has used the term reprisals to cover both the property seizures of medieval and early modern times and the more varied forms of modern peacetime retaliation. This procedure makes it possible not only to avoid a terminological controversy that does not appear to have had any particular influence on the actual practice of states but also to avoid awkward circumlocutions since retaliation is the only one of the three terms that can conveniently be used as a verb—an advantage recognized by most of the authorities cited above in their descriptive texts if not in their definitions.

procedural regulation, and was limited to the attainment of compensation for damages to the extent of damages received.

By the eighteenth century private reprisals had disappeared. Peacetime retaliation continued, however, in the form of public reprisals. These were not merely the substitution of state power for private power in the seizure of property for the benefit of wronged individuals. Wrongs to individuals continued to exist as a cause of reprisals, these wrongs occurring in the form of discriminatory policies and injustices directed against foreigners, the failure of the offending state to pay its debts, the seizure of property without compensation and so forth. But offenses committed directly against the retaliating state became a major cause of retaliation and, similarly, offenses originating in acts of the state itself became more common as cause for reprisals than offenses originating in the acts of private individuals.

As the reasons for reprisals changed so did the methods. The element of self-help remained but it was no longer literally interpreted. Instead, the modern reprisal was employed for purposes of coercion. In other words, it was the object of public reprisals to force the offending state to do justice rather than to secure that justice for itself by seizing property in sufficient quantity to compensate for loss. Property seizure continued in the pacific blockade but such seizure was not intended to be permanent. It was a means and not an end and was frequently supplemented or replaced by such acts of force as bombardment and occupation of territory.

In time of peace retaliating states have resorted to acts of limited duration directed against the offending state and having relatively little effect on the rest of the international community. Wartime retaliation, on the other hand, has been implemented by measures embodying far-reaching changes in the law of war and affecting not only the state which is the victim of retaliation but also the neutrals. Such wholesale alterations of the international situation have been based on two assumptions: first, that the employment by one belligerent of an illegal method of warfare releases its opponent from any obligation to refrain from corresponding measures and may even place it under the obligation [2] to punish illegality with corresponding meas-

2. It is not clear from the statements of retaliating governments whether this obligation has been regarded as one which is owed to the international community

ures; second, that it is a neutral duty effectively to protest against violations of neutral rights, that if this duty be not performed, it is the right of the belligerent to protect itself against the consequences of the enemy's violation of neutral rights by adopting similar measures, while the neutral loses the right to protest against the acts of the retaliating belligerent.

Warring states have justified their use of the weapon of retaliation on the basis of a great variety of acts performed by the opposing belligerent: acts clearly illegal; acts which because of their novelty have no clear legal status; acts which are admitted weapons of the opposing belligerent; and acts which the retaliating state merely accuses the enemy of employing.

Neutrals too, either singly or in alliance, have resorted to retaliatory measures to protect their rights against belligerent encroachments. As in all other forms of retaliation, a normally illegal measure, usually in this case the seizure of belligerent ships, is justified as a response to the unlawful acts of the belligerent against which it is directed and as a method by which the offending state can be forced to render that satisfaction which it has previously refused.

It is obvious that the retaliatory weapon, although it is included in the legal arsenal, can be extremely dangerous to international law if no limit be placed on the unusual action which a state may lawfully pursue in response to the illegal acts of another. In the absence of such limitation, retaliation may carry within itself the seeds of the destruction of the entire system of law. The high degree of regularity which characterized the enforcement of private reprisals was achieved through the development of relatively uniform local laws supplemented to some small extent by treaty provisions. Public reprisals and wartime retaliation, on the other hand, have remained almost completely free of regulation—either as to justifiable cause or as to appropriate measures of redress. True, international tribunals have, from time to time, established criteria by which the legality of retaliatory acts may be judged, but while these are followed by jurists, it is not equally clear that they have been or will be followed by states.

---

or as part of the state's function of protecting the interests of its citizens. See *infra*, pp. 139, 183.

It is the purpose of this essay, therefore, to attempt to discover what the actual practice of states with regard to retaliation has been in certain periods or types of situation in which the employment of the doctrine has been particularly widespread or significant. To this end the nature of the acts to which states have responded with retaliatory measures must be studied as well as the nature of the measures which states have employed as a deterrent to the illegal acts from which they are suffering. To stop at this point, however, would be to present the picture purely in its historical aspects. From the legal point of view, the criteria of jurists are relevant to the purposes of analysis regardless of their effectiveness and it must therefore be asked whether retaliatory measures have actually been taken in response to and for the suppression of the illegal acts of another state or for some ulterior purpose; whether the offending state has been given the opportunity to rectify the wrong complained of before retaliatory measures are resorted to; whether such acts are in proportion to the original offense; whether and to what extent such acts have interfered directly or indirectly with the rights and interests of third states; and, whether retaliatory acts have actually produced the ends ostensibly desired by those who employ them.

The answers to these questions in each case of retaliation studied will not necessarily determine the legality or illegality of the action taken for, as has been said, the law of retaliation exists in clear and logical form only in the commentaries of jurists and in a handful of decisions. What is sought rather is the function of a doctrine of retaliation in an international legal system—whether it serves as an instrument of law enforcement or whether it is merely an instrument for the rationalization of national policy; whether it is a practice that must disappear completely if world organization is really to be achieved or whether it has anything of value to offer to such organization.

SECTION ONE

Peacetime Reprisals

CHAPTER I

Private Reprisals, Particularly as Practiced in England

REDUCED to its elements, private reprisal as practiced in late medieval and early modern times was the seizure, licensed by the authorities of a community, of the goods of a foreign community for the benefit of one or more members of the retaliating community who claimed to have suffered a loss through the failure of the community against which the reprisal was authorized to right a wrong committed by one or more of its members. Such reprisals could be authorized in time of peace as well as in time of war; the right to authorize them tended to be limited to the sovereign or his agents; and they were not considered a breach of the peace unless specifically prohibited by treaty.[1]

Reprisals of this type are commonly thought of exclusively in terms of licensed seizures by private individuals. Writers on private reprisals, particularly those dealing with the medieval period, have emphasized their "self-help" aspects,[2] linking "self-help" with the term "private" and the tendency has been to overlook the practice—predominant in the fourteenth and early fifteenth centuries—of seizure by the state for the benefit of the private person. The similarity in all other respects of the two types of seizures would render it more confusing than helpful to give one the name "private reprisal" at the expense of the other. Private reprisals are to be distinguished from

1. Letters of reprisal granted under these circumstances should be distinguished from letters of reprisal granted to privateers in time of war. The latter simply authorized the privateer to seize enemy public and private ships and bore no relation to prior loss on the part of the individual receiving a license.

2. Albert Hindmarsh, "Self-Help in Time of Peace," 26 *AJIL* (1932), p. 315 is typical of this tendency; cf. also Grover Clark, (*loc. cit.*)

other retaliatory acts in time of peace not so much because they were carried out by private individuals as on the grounds that they had as their aim the compensation of specific individuals in cash terms of loss plus damage. This meant that the case was closed when sufficient property had been taken from members of the offending state to restore the sufferer's loss [3] and no question of further penalty was involved.

Historical Background

The simple idea of retaliation is as old as the customs underlying the *lex taliones* and it is probable that, even in its most primitive form, it was limited in some way, were it only by the rule of equality laid down in "an eye for an eye, a tooth for a tooth." [4]

Reprisals similar in nature to those of the medieval and early modern periods were practiced among the city states of the ancient Mediterranean world and were regulated both by treaty and by local law. Thus a treaty between Oeantheia and Chalaeum in 431 B.C. providing for the total discontinuance of reprisal seizures on land and in seaports confined the practice to the open seas and called for the payment of a fine in the event of unlawful seizure.[5] A treaty between Rome and Carthage in 306 B.C. went even further abolishing reprisals between the parties altogether [6] and Dareste notes that one of the greatest benefits one Greek city could confer upon another was the renunciation

3. Certain early cases are exceptions. In such cases officials are ordered to hold the goods until the plaintiff is satisfied, the implication being that the offending state may, by doing justice, secure the restoration of its subjects' goods. For the most part, however, goods so held were ultimately turned over to the individual involved in default of other compensation. See Wm. de Waynflet v. The Duke of Babant, *C.C.R. Edw. I*, 1302–7, p. 4; Eustace Malherbe v. The Zeelanders, *ibid.*, p. 152; Richard de Fakenham v. The Norwegians, *C.C.R. Edw. II*, 1307–1313, p. 155; Ranulph de Burgh v. Bruges, *ibid.*, p. 247.

4. For a discussion of the role of collective responsibility and retaliation in certain contemporary primitive societies see Robert H. Lowie, *Primitive Society* (New York, 1920), p. 399 *et seq.*

5. Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London, 1911), Vol. II, pp. 70, 71; Rodolphe Dareste, *Nouvelle Études D'Histoire du Droit* (Paris, 1902), p. 41.

6. Phillipson, *op. cit.*, p. 364.

of the right to take reprisals against its citizens.[7] Reprisals were also limited in the ancient world by the exemption of certain individuals and classes from their effects. Personal immunity might be conferred on certain individuals either because they had rendered distinguished service to the city granting the immunity or because they were engaged in the performance of some special type of work principally at the direction of their own or some foreign government. Actors were generally among the special classes immune from reprisals and an Aetolian decree of the second century B.C. exempted those proceeding to Pergamus to take part in the solemn games as well as contractors of public works and their employees.[8]

The practice of reprisals appears to have continued until the conquest of the ancient world by the Romans although during the period of Macedonian supremacy regulation reached greater heights and it had become established practice that aggrieved individuals should first set forth their claims to their respective governments and obtain licenses from them.[9] The establishment of the Roman Empire seems to have put an end to any widespread practice of reprisals in the territory under Roman rule.[10] The practice did not disappear entirely, however, and in the later Empire its return to more common usage is indicated by frequent attempts to suppress it. Thus in 422 A.D., Honorius and Theodosius expressed their disapproval of seizures of an individual's goods for the debt of another, whether public or private; fifty years later Zeno, in a similar statement, emphasized that molesting others under such circumstances was not only contrary to law but also antagonistic to the natural principles of equity; and in 537 A.D., Justinian, referring to seizures constantly being made in violation of prohibitive laws, laid down severe penalties for offenders.[11]

With the disintegration of the Empire, tendencies, in the absence of

7. Dareste, *op. cit.*, p. 41.
8. Phillipson, *op. cit.*, pp. 357, 362, 363; Dareste, *op. cit.*, pp. 41, 43.
9. Phillipson, *op. cit.*, pp. 355, 356.
10. René de Mas Latrie, *Du Droit de Marque ou Droit de Représailles au Moyen-Age* (Paris, 1875), p. 7; Dareste, *op. cit.*, p. 49.
11. Phillipson, *op. cit.*, pp. 365, 366; Dareste, *op. cit.*, pp. 49, 50; Mas Latrie, *op. cit.*, p. 7.

centralized authority, to revert to the practice of reprisals were probably strengthened by the emphasis in German law upon the principles of collective responsibility.[12] Of the connection between the decline of the Empire and the revival of reprisals, Bartolus declares: "Reprisals were neither a current nor an everyday matter at the time when the Roman Empire existed with proper authority. But after we deserved for our sins that the Roman Empire lay prostrated for a long while and that the kings, the princes, and even the cities, especially in Italy, did not longer recognize, at least in fact, a superior authority in secular matters so that in case of a wrong there was not a superior power to which recourse might be had, reprisals gradually were resorted to with greater frequency and thus became a current and everyday matter." [13]

The revival of reprisals, of course, was not immediately accompanied by their subjection to detailed regulation and it is probable that considerable lawlessness accompanied their earliest use. By the thirteenth century, however, regulation, both local and of treaty origin, had become fairly extensive and the issuance of licenses by the authorities of the community had become a necessary prerequisite to the seizure of goods in reprisal.[14] Local regulation in this and subsequent centuries was concerned extensively with the procedures to be followed by those who wished to secure letters of reprisal and with the conditions under which they were to be utilized. Local provision was also made for the exemption of individuals or groups from the effects of reprisals.[15] International regulation in the form of treaties tended to be concerned with defining just causes of reprisals, establishing the procedures that were to be followed as between two communities prior to the authorization of reprisals, and, finally, abolishing reprisals between the parties to an agreement.[16]

The economic disadvantages of private reprisals were early recog-

12. Mas Latrie, *op. cit.*, pp. 8, 9; Hans W. Spiegal, "The Origin and Development of Denial of Justice," 32 *AJIL* (1938), pp. 64, 65.

13. Angelo P. Sereni, *The Italian Conception of International Law* (New York, 1943), p. 45*n*.

14. A. E. Hindmarsh, *loc. cit.*, p. 316; Georg F. de Martens, *An Essay on Privateers, Captures and Particularly on Recaptures* (London, 1801), pp. 9, 10; Ernest Nys, *Les Origines du Droit International* (Paris, 1894), p. 63.

15. For examples of such exemptions, see *infra* pp. 40, 41.

16. For a fuller discussion of treaty regulations see *infra* pp. 27–32.

nized particularly in such highly developed commercial communities as the Italian states and the Hanseatic League. As early as the twelfth century, Sereni points out, dozens of treaties abolishing reprisals between the parties had been concluded among the states of the Italian peninsula.[17] It was not until the fifteenth century, however, that reprisals had ceased in an Italy which, even so, was well in advance of the other countries of Europe. The ultimate disappearance of private reprisals was facilitated not only by treaties that abolished them entirely but also by the development of alternative practices. One of the most important of these was the development of legal procedures expediting the settlement of disputes in which foreigners were involved. In fourteenth-century Florence, for example, the courts of the Mercanzia gradually assumed jurisdiction over disputes between gild members and foreigners and adopted procedures that were much less complex and time consuming than those of the ordinary courts and in which the spirit of the laws as well as their letter was carefully considered.[18] A similar advance in legal procedure were the treaties concluded among the Hanse cities which abolished reprisals and provided that a judgment rendered in any Hanse city might be executed in any other Hanse city.[19] Also important were attempts to provide funds for the satisfaction of claims that might otherwise lead to reprisals. Thus, in 1218, Perugia and Florence signed a treaty in which it was agreed that reprisals would not be authorized and that special duties would be levied on the goods of their merchants to be allotted to the payment of indemnities.[20]

By the fourteenth century, the practice of reprisals had become rare in Italy and by the fifteenth it had disappeared entirely.[21] In England and elsewhere in Europe, however, the practice of private reprisals continued until the second half of the seventeenth century.

17. Sereni, *op. cit.*, p. 48.
18. *Ibid.*, pp. 141–145; Frederic R. Sanborn, *Origin of the Early English Maritime and Commercial Law* (New York, 1930), pp. 143–145; W. S. Holdsworth, *A History of English Law* (London, 1924), Vol. V, p. 74.
19. Nys, *Les Origines*, p. 68.
20. Sereni, *op. cit.*, p. 48.
21. *Ibid.*, p. 49.

English Practice

Private reprisals as practised in England were of two principal types, town-to-town reprisals and reprisals against foreigners. Town-to-town reprisals, taken by the local authorities on behalf of aggrieved citizens, were the subject of numerous provisions in twelfth- and thirteenth-century borough charters. Some of these charters expressly granted the authorities the right to take reprisals while others provided that the burgesses of the borough in question were to be exempt throughout the king's realms from seizures for the debts of others.[22] Town-to-town reprisals were prohibited by Parliament in 1275. Although this prohibition does not appear to have met with complete and immediate success, only in the Cinque Ports did the practice persist over any considerable period of time. Here reprisals against other English towns (known locally as withernam) were authorized as late as the sixteenth century despite the disapproval of the central government.[23]

English practice of international private reprisals falls roughly into three periods distinguished by method of enforcement and extent of regulation. Such acts having first made their appearance in any number in the legal records of the late thirteenth century, it is then that the first period may be said to have begun. The chief characteristic of this period, which included the fourteenth and early fifteenth centuries, was the use of state power in the form of seizure by local officials.[24] In the second period, reprisals by private seizure, generally taking place on the high seas, began to replace state enforcement. Authorizations of such seizures appeared as early as the late thirteenth century but it was not until the late fifteenth and the sixteenth century that they became the general rule and their prevalence was accompanied by a decline in the legal standards governing the use of reprisals. In the third period, that of the sixteenth and seventeenth centuries, state

22. See Adolphus Ballard, *British Borough Charters, 1042–1216* (Cambridge, 1913), *passim;* Adolphus Ballard and James Tait, *British Borough Charters, 1216–1307* (Cambridge, 1923), *passim;* Mary Bateson, *Borough Customs* (London, 1905), Vol. I, *passim;* D. A. Gardiner, "Belligerent Rights on the High Seas in the Fourteenth Century," 48 Law Quarterly Review (1932), p. 538.

23. K. M. E. Murray, *The Constitutional History of the Cinque Ports* (Manchester, 1935), pp. 52, 53, 223.

24. In this, they closely resembled town-to-town reprisals.

regulation was carried to considerable lengths and public reprisals made their appearance. By the eighteenth century private reprisals had disappeared and their disappearance was confirmed through abolition by treaty.

In all these periods private reprisals had certain unchanging characteristics. As to causes—they had in common the fact that they arose from an alleged crime, generally robbery or failure to pay a debt, committed by the subject or agent of one state against the subject or agent of another, a crime for which no redress was to be had from the offender's ruler despite the efforts of the injured individual or the appeal of his sovereign. As to issuance—they were alike in that they could be authorized only by the ruler or by such agents of his as the admiralty court, against the property and persons of the people of the offending state, and for an amount susceptible of expression in pecuniary terms and equivalent to loss plus reasonable costs.

Denial of Justice

The legal right to issue a letter of reprisal to an aggrieved subject rested exclusively in all three periods upon the pre-existence of a denial of justice. On this point the records are unanimous. In 836 A.D. a treaty between Sicard of Benevant and Naples limited the issuance of reprisals to cases in which a denial of justice occurred; [25] the Treaty of Utrecht in 1713 contained the same provision.[26] The fact that, of the

25. Spiegal, *op. cit.*, p. 64.

26. Mas Latrie, *op. cit.*, p. 54. Other treaties similarly limiting the issuance of reprisals include those between Emperor Lotar I and Venice in 840, Spiegal, *op. cit*, p. 65; Henry III of England and Lubeck, Ernest Nys, *Les Origines du Droit International* (Paris, 1894), p. 66; England and Portugal in 1386, Clark, *op. cit.*, p. 710; England and the Hanse in 1403, W. Cunningham, *The Growth of English Industry and Commerce* (Cambridge, 1927), vol. I, p. 421; England and the Hanse in 1410, Charles Gross, *The Gild Merchant* (Oxford, 1890), p. CVI; England and France in 1514, *C.S.P. Hen. VIII*, 1509–1525, p. 231; Spain and France in 1525, Jean Dumont, *Corps Universel Diplomatique du Droit des Gens* (Amsterdam, 1726–1731), vol. IV, part I, p. 400; England and France in 1546, Nys, *op. cit.*, p. 75; England and France in 1559, *A General Collection of Treaties, Declarations of War, Manifestos, and other Publick Papers, relating to Peace and War* (London, 1732), vol. II, p. 46; France, Spain, and Savoy in 1598, Dumont, *op. cit.*, vol. V, p. 561; the United Provinces and Spain in 1609, Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (London, 1930), p. 133; England and France in 1632, Dumont, *op. cit.*, vol. VI, part I, p. 33; England and

many treaties affecting reprisals, few contain other provisions or restrictions, is evidence of the fundamental nature of this requirement.

Statutes and charters were equally insistent on a denial of justice as a prerequisite for reprisal. In the thirteenth century the *Leges Quatuor Burgorum* forbade inter-borough reprisals except in cases where the reeve of another borough had failed to do the claimant justice.[27] Enacted in 1353, the Ordinance of the Staple provided that foreign merchants were not to be held for the crimes and debts of others but "si nuls noz Liegez gentez, merchauntz, ou autres, soient endamagés par ascuns seigneurs des estraunges terres ou lour subjectz et les dites seigneurs duement requis faillent de droit a nous ditz gentz; nous eions le ley de marck et repisalx, come ad este use avant cez heures, saune fraude ou mal engine." [28] The statute's reference to past usage is no empty appeal to dubious tradition. As early as 1303 a letter authorizing seizures on behalf of Henry de Lincoln cites the failure of the Duke of Zeeland to exhibit justice as justification for the reprisal.[29] The many other letters granted prior to the Ordinance are almost identical in this respect.

In 1332 the Parlement of Paris refused a merchant's request for letters of marque and reprisal against the subjects of the King of Majorca because the merchant had failed to show any denial of justice on the part of that ruler.[30] Letters of reprisal granted in Scotland to David Robertson were suspended until justice had been demanded of

the United Provinces in 1654, Bynkershoek, *op. cit.*, p. 134; France and England in 1667, *General Collection of Treaties*, p. 133; England and Spain in 1670, Reginald D. Marsden, *Documents Relating to the Law and Custom of the Sea* (London, 1915), vol. II, p. 284; France and the United Provinces in 1678, Dumont, *op. cit.*, vol. VII, part I, p. 358; France and England in 1697, *General Collection of Treaties*, vol. I, p. 305; the United Provinces and France in 1697, Dumont, *op. cit.*, vol. VII, part II, p. 386.

27. Spiegal, *op. cit.*, p. 66; Mary Bateson, *Borough Customs* (London, 1905), vol. I, p. 121.

28. Georg F. de Martens, *An Essay on Privateers, Captures and Particularly on Recaptures* (London, 1801), p. 12*n*. Cf. also decrees of Alfonso IX of Leon, Spiegal, *op. cit.*, p. 66*n*; Law of Aragon of 1263, Mas Latrie, *op. cit.*, p. 12; French ordonnance of 1313, *ibid.*, p. 16.

29. *C.C.R. Edw. I*, 1302–1307, p. 14. It should be noted that throughout this text the spelling of place names corresponds to that used in the documents on the particular case under consideration.

30. Mas Latrie, *op. cit.*, p. 16.

Hamburgh.[31] In 1651 the English Council of State advised the Muscovy Company that before petitioning for letters of reprisal it must have suffered a denial of justice.[32] In 1659 reprisals were refused to certain traders of Middelburg because it was found that there had been no denial of justice, the traders themselves having protracted the trial unnecessarily.[33]

Occasionally enactments regulating reprisals were fairly specific in their descriptions of the denial of justice required for the issuance of licenses. In 1255 the borough charter of Lincoln granted to the burgesses "That they or their goods, which may be found in any place in our realm, shall not be arrested for any debt of which they are not the sureties or principal debtors, unless perchance the debtors are of their community and power and have wherewith they can satisfy their debts in whole or in part, and the said burgesses made default of justice to the creditors of the same debtors and this can be reasonably proved." [34]

The mere requirement, however, that there be a prior denial of justice provides the modern investigator with but little information as to the actual situation in which reprisals were authorized. To discover the meaning of this much disputed phrase—further confused in this period by a background of incomplete legal and national state systems—one must seek in actual procedure the events, however named, that justified the issuance of reprisals. On the basis of this procedure, it would seem that two elements at least were involved in a denial of justice. These were: the commission of a wrong by the citizen or agent of one state against the citizen or agent of another; the denial of redress to the individual wronged despite the interposition of his own ruler. Frequently involved also was an intermediate stage—the inability of the wronged individual to obtain redress from the criminal's state by his own efforts.

31. *C.S.P. Dom.*, Chas. I, 1629–1631, p. 277.
32. *C.S.P. Dom.*, 1651, p. 46.
33. Bynkershoek, *op. cit.*, p. 136.
34. Adolphus Ballard and James Tait, *op. cit.*, p. 230. Between 1255 and 1300 this provision appeared in forty-one charters. See *ibid., passim.* For other borough charters requiring denial of justice see those of London, 1155, *ibid.*, p. 269; Bristol, 1188, Bateson, *op. cit.*, vol. I, p. 120; Colchester, 1189, Adolphus Ballard, *op. cit.*, p. 163; Dunwich, 1205, *ibid.*, p. 165; and Yarmouth, 1208, Bateson, *op. cit.*, p. 120.

The Initial Wrong

Acts giving rise to the ultimate issuance of private reprisals almost invariably involved the failure to pay a debt or robbery, either on land or sea, and sometimes murder as well. Only one case involving such intangibles as national honor was found in the English records and here goods of merchants of the Hanse were arrested, not only because the merchants had spoken unbecomingly of the king and the English nation, but also because they had committed the more concrete offense of procuring the death of a Bristol merchant.[35] In the early cases it is not clear from the documents how the crimes were proved. Most of the letters, however, contain detailed accounts of the events complained of and occasionally indicate that some sort of action was followed that brought the facts to the attention of the plaintiff's local lord or the officials of his community. Typical of such accounts is that found in the letter authorizing reprisals against the Zeelanders on behalf of two English merchants. "Peter de Scothowe of Norwich and William de Rollesby of Yarmouth, merchants of England, lately caused two ships to be laden at Yarmouth with wines and other victuals, and caused the wines and victuals to be taken to Zealand to trade there with them, [and] certain malefactors of Zealand entered the ships by force and arms and took and carried away Peter's wines and victuals to the value of 50 £ against the will of Peter and William and of their yeomen then in the ships, without making any satisfaction therefor, as the king learns by the letters of John, duke of Lorraine, Brabant and Lymburgh, his son, under the seal and by the letters of the communities of the city of Norwich and of the town of Yarmouth under their common seals. . . ." [36] Similarly in the case of Bernardus Falquerie against the Majorcans (1330) the seneschal of Beaucaire and Nîmes testified to the facts involved.[37] Later proof of loss became a court proceeding and as early as 1384 a French petitioner for letters of marque and reprisal proved his case before the Parlement of Paris.[38] In England

35. Richard Curteys v. the Hanse, *C.P.R. Edw. III*, 1350–1354, pp. 152, 153, 183, 246.

36. *C.C.R. Edw. I*, 1302–1307, p. 63. See Aymer de Insula v. the Flemish where the king orders the sheriff of Kent to inquire by "oath of natives and aliens" concerning a claimed robbery, *C.C.R. Edw. II*, 1313–1318, p. 387.

37. Mas Latrie, *op. cit.*, p. 90.

38. Adam de Bans v. the Portuguese, Augustin Thierry, *Recueil des Monuments Inédits de l'Histoire du Tiers État* (Paris, 1850), vol. I, pp. 715, 16.

the well established practice of proving losses before the Admiralty Court was made mandatory by order of the Privy Council in 1625,[39] and a similar procedure was required of French merchants by the Ordonnance de la Mer of Louis XIV.[40]

Delay or Failure of Justice

Examination of the records shows a fairly frequent omission of any attempt by the plaintiff to secure justice through his own efforts. An international community in which local legal systems were not yet solidified would make unlikely a requirement that local remedies be exhausted and, in many cases, it appears that the plaintiff's prince has appealed directly to the offender's lord. Da Legnano, writing in 1360, prescribes a fairly advanced system of appeals to be followed by the injured party [41] and there are many cases that do show an attempt by the wronged individual to secure justice from the assailant's ruler. In these cases may be found examples of treatment considered a basis for interposition. Most common among the causes of reprisals was undue delay of justice. An apparent denial of justice, holds Molloy, is occasioned by the putting off of judgment from term to term without cause. "If . . . the Party cannot obtain his Definitive Sentence or Judgement within a fit time against the Person of whom he complains . . . the Bodies or movables of his Subjects, who renders not right, may be taken." [42] Letters of reprisal were granted to Robert Fenwick and William Phillipps because "notwithstanding the often promises of justice to be donne unto them they have bin delayed so long tyme from recovering their sayd losses . . . as they are altogither unlikely and out of hope to fynd remedie in that realme." [43]

An unwarranted delay of justice might take place after the sovereign's letter of request for justice as well as before. This occurred in the case of John Hampshire and Henry May (1447) who, to their

39. *A.P.C. Jas. I*, 1624–5, p. 449. See also Marsden, *op. cit.*, vol. I, p. 410. Cases prior to this in which proceedings before the Admiralty Court are mentioned include Richard Elure v. the Portuguese in 1575, *A.P.C. Eliz.*, 1575–1577, pp. 62, 3 and John Foxall v. Spain in 1585, Marsden, *op. cit.*, p. 241.

40. *Ordonnance de Louis XIV Roy de France et de Navarre touchant la Marine* (Paris, 1681), Livre III, Titre X, I.

41. Giovanni da Legnano, *Tractatus de Bello, de Represaliis et de Duello* (Oxford, 1917), pp. 322, 3.

42. Charles Molloy, *De Jure Maritimo et Navali* (London, 1676), pp. 15–18.

43. *A.P.C. Eliz.*, 1597, p. 142.

great expense, sued for justice in Brittany for three years, supported by letters of request from Henry VI to the Duke. Considering "that justice is and has been against all conscience denied or at least delayed to the same John and Henry diligently suing for their right, and willing to make provision that justice or at least the execution of justice perish not in this behalf . . ." the king granted letters of marque and reprisal.[44]

Justification for letters of marque might also arise from the refusal of the sovereign to take any action whatsoever. William Tollere, when robbed by Westphalian pirates, appealed to their lord, the Archbishop of Cologne, for justice. The latter making frivolous and untrue excuses refused to take any action although it was shown, on oath of English merchants, that the malefactors were present in his jurisdiction. This was interpreted as constituting a denial of justice and letters of marque were granted to Tollere by Edward II.[45]

Friction between lord and vassal and the inability of the nominal overlord to enforce obedience were weaknesses of the feudal system leading to failure of state action and thence to reprisals. In 1310, for example, the burgesses of Bruges refused to satisfy Ranulph de Burgh for some money that had been stolen from him although their lord, the Count of Flanders, had ordered them to do justice. The Count in informing Edward II of this fact added "that he was willing that the goods of his men wherever found in the king's dominion should be distrained until the said merchants were satisfied" [46]—an apparent acceptance of the fact that the count's own authority in Bruges was not sufficient to ensure the carrying out of his orders.

Denial of justice in these cases was the result of the sovereign's failure to act; it might also be the consequence of an unlawful or arbitrary use of state power. In illustration of this point Molloy

44. A. E. Bland, P. A. Brown, and R. H. Tawney, *English Economic History: Select Documents* (London, 1914), pp. 190–2. See also Martissans de Harques v. the English, 1591, P. Laffleur de Kermaingant, *Mission de Jean de Thumery* (Paris, 1886), pp. 274–6.

45. *C.C.R. Edw. II*, 1307–1313, p. 361.

46. *Ibid.*, p. 247. For a similar case in which the king of France was unable to assert his authority over the Countess of Artois see *C.C.R. Edw. II*, 1313–1318, pp. 181, 2, and also Guillaume Houlon v. Douay and Amiens, *C.C.R. Edw. II*, 1307–1313, p. 6. It should be noted that in these cases reprisals were ordered against Artois and Douay and Amiens respectively, not against France.

writes: "An English Man pursues his right in the legal Courts beyond Seas; and the Military Governor opposes the prosecution, and by force conveys away the debtor and his Goods, the Sentence of Judgement is obtained, its ultimate end being Execution, being thus frustrated, may occasion Letters of Reprisal." [47]

In 1442, William Willey received letters of marque against the Florentines from Henry VI having shown that he had been hindered from enforcing a Florentine judgment against a merchant of that place, "notwithstanding royal letters of request . . . , being repelled and delayed by various pretences, protections and other frivolous and unjust allegations and by undue favour, neglect and delay on the part of the said magistrates or powers and judges. . . ." [48] Thomas Podmore obtained letters of marque against the Milanese by showing that the Duke of Milan had personally intervened to prevent the enforcement of a judgment handed down in Thomas' favor in the Duke's own court of summary justice.[49] In the case of John Burton, refusal of the Ostend court to grant a hearing was shown to be the result of the judges' partiality toward one Adrian Clark, burgomaster of the town, into whose hands the pirates had delivered the ships and goods of which John had been robbed.[50]

Unjust Judgment

An unjust judgment was also regarded as legitimizing the issuance of letters of marque. The early writers on international law were agreed on this point but insisted that there must be absolutely no doubt as to the injustice of the judgment "for in causes dubious or difficult, there is a presumption always that Justice was truly administered by them, who were duely elected to publick Judgements." [51]— For the most part their view seemed to be based upon the conviction that "the authority of the judge has not the same validity against foreigners as against subjects." [52] "Subjects," Molloy argues, "cannot

47. Molloy, *op. cit.*, p. 19.
48. *C.P.R. Hen. VI*, 1441–1446, p. 80.
49. *C.P.R. Hen. VI*, 1446–1452, pp. 308, 9.
50. *C.P.R. Edw. IV and V, Rich. III*, 1476–1485, pp. 369–70.
51. Molloy, *op. cit.*, p. 18. See also Hugo Grotius, *De Jure Belli ac Pacis* (Oxford, 1925), p. 627, and Richard Zouche, *Juris et Judicii Fecielis sive, Juris Inter Gentes, et Quaestiondum de Eodum Explicatio* (Baltimore, 1911), p. 33.
52. Zouche, *op. cit.*, p. 33.

by force hinder the Execution, even of an unjust Judgement, nor lawfully pursue their right by force, by reason of the efficacy of the power over them: but Forraigners have a right to compel which yet they cannot use lawfully, so long as they may obtain satisfaction by Judgement. But if that ceases, then reprisal is let in." [53] None of this is very enlightening, however, as no criteria are given as to what constitutes a "manifestly unjust" judgment. Nor are the recorded cases of aid since only one has been found that turns upon this point. This is the case of George Henley v. the Dutch of 1638.

Henley and his partner had been granted letters of reprisal against the Dutch. The Dutch Ambassador thereupon appealed to King Charles for their withdrawal on the ground that justice to Henley had been neither denied nor delayed. Commenting on their appeal, the Admiralty judge, Sir Henry Marten, wrote to Secretary Coke as follows: "The effect is that the letters of reprisal to Henley are not well grounded, because justice is not denied nor delayed, which he [the Dutch Ambassador] proves, because Henley had a former sentence for him, and a latter against him, and the latter pronounced by judges of great worth. The answer is that this kind of arguing passes not for good . . . before the God of Heaven, nor . . . before the gods of the earth, sovereign princes and states, for there a sentence is not made just by the rules of the civil law, nor by domestic practice; reality of truth only, not fictions of law, have approbation. . . . A judgment not supported with reasons that may give satisfaction to another state is so far from justifying the wrong, as it adds a further contumely and scorn. By the law of nations, if the spoil cannot be justified, Henley must have his goods again, notwithstanding any arguments drawn from their politic constitutions or local manner of judicial decision. Henley does not require his goods because he had a former sentence, nor think it just an error in the former judgment, but because he, being a merchant had by lawful trade purchased those sugars, which were upon the seas, far out of any territory of the States, violently taken from him by a man-of-war of Holland and brought in thither." [54] Here, of course, the conclusion is that a judgment may be perfectly correct under national law and yet may justifiably be regarded as

53. Molloy, *op. cit.*, p. 18.
54. *C.S.P. Dom. Chas. I*, 1637–1638, p. 300.

incorrect by another state if it perpetuates the original violation of international law.

The history of this case sheds little further light on the subject since its subsequent treatment was influenced more by the politics of Spanish-Dutch rivalry at the English court than by legal principles.[55]

Sir Leoline Jenkins in an advisory opinion to the King in Council placed within narrow limits the concept of an unjust judgment as it might be used to justify reprisals. Of Captain Cooke's case for reprisals he said: "It is true his Case is sad, and it may be as true, that these Sentences were given not with any Intention to remedy him, but as an Amusement only, and with a design to put him off." But no grounds as yet existed for the authorization of reprisals for "In this Case, it cannot be said that there is a Denial, in Regard that here is an entire Satisfaction awarded in the Queen's Commissions, with Circumstances of seeming Favour, all Appeals and other intermeddling with the Merits of the Cause being absolutely forbid, and all necessary Power for the due execution of them given to the proper Officer; nor yet do the Delays suffered in Spain amount to a Denial of Justice, for though the attendance there was for nine whole Months, yet a Judgment being sued for, and at last given, that Delay cannot be said to amount to a Denial of Justice." That Cooke's pursuit of his rights might be attended by grave inconveniences, might force him to seek justice in Havana, might be so protracted that the insolvency or disappearance of the criminals could well be expected, these factors "are Accidents, for which it can hardly be made out that the Crown of Spain is accountable, in case the Courts of Justice are otherwise always open. For these casualties are such as frequently intervene in all the Governments of the world; and where men come to be insolvent, or cannot be met with, there can be no Remedy, tho' the Government itself be never so nearly concerned, either in its own Revenue, or in the Execution of Publick Justice." [56]

Interposition

An indispensable prelude to the authorization of reprisals was the interposition of the plaintiff's ruler. Only after the request for justice,

55. *Infra*, p. 34, note 96.

56. William Wynne, *The Life of Sir Leoline Jenkens* (London, 1724), pp. 778, 9.

repeated several times, had failed of its purpose was the denial of justice complete. Thus, during the reign of Louis XI, a letter of marque granted to Pierre Simonneau against the Castilians was suspended until after a French Ambassador had returned from Spain and reported the Spaniards' refusal to do justice.[57] In 1655 a representative of Venice in England reported that "By the advice of the Admiralty judges the Protector has decided not to grant letters of reprisals to the merchants to whom his Catholic Majesty is indebted, who have repeatedly asked for them. It is found that by the civil law and the laws of war also these cannot be granted without previous notice to his Majesty to give satisfaction to his creditors. . . ." [58]

In the earlier period this interposition commonly took the form of letters of request. Customary rather than treaty law seems to have led to the requirement of the letter of request and it is not until the sixteenth century that it is called for by treaty with any frequency. Nevertheless, references to such requests appear almost invariably in reprisal authorizations from the beginning of the fourteenth century and many of the actual letters have been preserved.

A typical letter of request recited the names of the plaintiffs, the time, place, nature, and *dramatis personae* of the crime, the value of the loss, and the steps taken by the victim to recover. It ended with a request for justice and sometimes with veiled threats of reprisals to come. Such a letter was that written by Edward II to Philippe le Bel in 1317. "Whereas John Godwyne of Brugewauter, merchant, sent a ship of his by certain of his servants to Bordeaux in order to carry wines to this realm, . . . the duke of Brittany, asserting that he had power by order of the king of France to arrest all ships of this realm coming to the realm of the king of France on account of certain trespasses committed, it is said, upon men of the duchy of Brittany by subjects of the king, has caused the said ship and certain wines of John found in her, to the value of 100 £ sterling, and certain of John's servants in the same to be arrested at Rouen, although John and his men were guiltless of the aforesaid trespass, as John alleges that he is ready to prove before the king of France; for which John has

57. M. A. R. de Maulde-la-Clavière, *La Diplomatie au Temps de Machiavel* (Paris, 1892), vol. I, p. 228.

58. *C.S.P. Ven.*, 1655–1656, p. 29.

prayed the king to provide him with a remedy: wherefore the king requests the king of France to order due and speedy justice to be done to John in this behalf concerning the arrest of his goods and servants." [59]

Occasionally a letter of request from one ruler to another included a statement of the writer's willingness to do justice to any subject of the king to whom he wrote who had suffered injustice.[60]

It seems likely that many letters of request achieved their purpose. Between 1317 and 1323, for example, Edward II wrote over fifty letters of request on behalf of subjects to whom letters of reprisal were not subsequently issued. They were addressed to the lords of Flanders, Brabant, Sicily, Brittany, Elbeuf, Norway, Namur, France, Hainault, Castile, Lübeck, Lorraine, and Florence.[61] A letter of the same ruler to Robert, Count of Flanders, illustrates the accommodating spirit with which letters of request might be received. Acknowledging letters from the Count and from the King of France concerning arrests of men of Flanders in England, Edward wrote "that he is prepared to do speedy justice in his courts to those of the count's subjects complaining of such arrests, as the king much desires that his and the count's subjects should converse in peace." [62]

In the sixteenth and seventeenth centuries letters of request were frequently replaced or supplemented by the direct appeal of ambassadors. In this period the ambassador performed two functions with regard to reprisals. The first, that of presenting the claims of his compatriots at the court to which he was accredited, was a function apparently acquired without formal agreement. The second function, that of providing a hearing to those with claims against his country and endeavoring to prevent the unjust issuance of reprisals, originated in treaty provisions.[63]

Ambassadors were frequently instructed to threaten the monarchs to whom they were accredited with counter reprisals should the injustice complained of be perpetuated. So, in 1601, Henri IV wrote to

59. *C.C.R. Edw. II*, 1313–1318, p. 565.
60. *C.C.R. Edw. II*, 1307–1313, p. 335.
61. *C.C.R. Edw. II*, 1313–1318, 1318–1323, *passim*.
62. *C.C.R. Edw. II*, 1313–1318, p. 80. See also letter to Genoa, 1316, *ibid.*, p. 41, and letter to the Flemish, 1320, *C.C.R. Edw. II*, 1318–1323, p. 221.
63. *Infra*, pp. 28, 29.

de la Rochepot, his ambassador at the Court of Spain "je veux que vous leur declariez, que je ne veux plus endurer telles injustices et rigueurs, protestant au dict Roy et à ceux de son conseil, s'ilz ne font cesser les injustices et violences susdictes et reparer ce qui s'est passé, je chercheray les moiens de m'en revancher. . . ." [64]

Often, however, the activities of the ambassadors were such as to prevent a situation arising in which threats of counter reprisals were necessary. For example, on April 15, 1539, the French ambassador in London reported that enquiries had been made of him as to the fate of the *Marie Thomas* of Bristol, reportedly seized by the Bretons. Ten days later he received a reply stating that the king "a écrit en Bretagne pour que, si les allégations des Anglais étaient véritables, la navire la *Marie Thomas* . . . et les marchandises qu'il contenait fussent immédiatement restitués, selon la teneur des traités. Marillac pourra d'ailleurs affirmer qu'il n'été delivré aucune lettre de marque." [65]

In November, 1597, the English Ambassador in Paris reported that "The Ambassador of Venice acquainted me within these twoe daies with a letter written to him from the State, wherein they doe sharpelie Complaine against twoe englishe Shippes, w^{ch} haue Iniuried and attempted the spoyling of certein of their shippes, about their Island, w^{ch} they beseech her mat^{ie} to redresse to thend that they maie not be constrained to take other course to revenge it aginst her mat^{ies} subjectes." [66] After other letters he was able to inform the Venetian ambassador in July, 1598, that satisfaction had been given.[67]

The attempts of ambassadors to ensure the peaceful settlement of disputes concerning reprisals were not always supported by their governments. De Bassompierre's mission to England in 1626 was concerned almost entirely with the question of reprisals. Just as he felt, perhaps over-optimistically, that the English were about to yield to his demands, news was received that the French had declared an em-

64. P. Laffleur de Kermaingant (ed.), *Lettres de Henri IV au Comte de la Rochepot* (Paris, 1889), p. 83.

65. Jean Kaulek (ed.), *Correspondence Politique de M. M. de Castillon et de Marillac* (Paris, 1885), pp. 90–94.

66. G. G. Butler (ed.), *The Edmondes Papers* (London, 1913), pp. 313, 4.

67. *Ibid.*, p. 353.

bargo on all British ships in their ports.[68] His criticism of this action was bitter and unqualified. "Vous avez fourny de prétexte legitime aux Anglois de prendre aux sujets du Roy pour deux millions d'or de marchandises, quand vous leur en avez arresté pour cent mille livres en Normandie. Vous aurez maintenant perdu le trafic, empesché le commerce, & fait saisir sur vous mesmes vos vins de Gascogne avec un dommage signalé de vos sujets & une grande diminution de vos fermes, & allez infailliblement entrer en guerre ouverte contre des gens contre qui vous n'estes point armé pour vous defendre." [69]

With the failure of letters of request, or, in the later period, of the efforts of ambassadors, to secure justice, a denial of justice came into being and no legal obstacle stood in the way of the issuance of letters of reprisal. Thus on the basis of study of the background and terms of letters of reprisal and still without attempting an abstract definition of the term "denial of justice" as used to justify private reprisals, it may be said that a denial of justice existed when, in spite of repeated requests from the sovereign of one state, the sovereign of another failed to put an end to a situation in which a subject of the first sovereign claimed that he had been wronged by a subject of the latter, was unduly delayed in his attempt to obtain judgment, or was refused it entirely, or was hindered in the execution of judgment already obtained either by interference or by the ruler's inability to enforce it, or was wronged by a manifestly unjust judgment. The next step in the procedure was the issuance of letters of reprisal. The enforcement of these letters was subject to strict regulation to some extent as the result of treaty, but for the most part in consequence of local ordinances.

Regulation of Enforcement

International Regulation

International regulation in the form of treaties was important principally in defining the procedure that must be followed before a denial

68. *Negociation du Mareschal de Bassompierre en Angleterre* (Cologne, 1668), pp. 287, 9.
69. *Ibid.*, p. 298, 9.

of justice could be said to exist. Such provisions, furthermore, became increasingly detailed in their procedural requirements with the passage of time. Early treaties merely stated the necessity for a denial of justice but later treaties established criteria for the existence of such a denial. As early as 1253 Jacques d'Aragon declared to the viscount of Narbonne that he would not issue letters of reprisal to his subjects until after they had addressed their claims to the consuls of Narbonne, had suffered a denial of justice, and twenty-one days had elapsed without a satisfactory response to formal demands for justice by the crown of Aragon.[70] A treaty between England and the Grand Master of the Teutonic Knights in 1410 provided for a lapse of six months between the making of final demands and the issuance of reprisals.[71]

As the practice of maintaining permanent representatives in foreign courts became generalized, provisions were made for the delay of action until the representative of the offending state had had the opportunity to investigate the situation and remedy the wrong. A treaty between France and England in 1606 thus declared "pour l'avenir ne seront expédiées aucunes Lettres de marque & représaille que premierement l'Ambassadeur residant prés de l'un & l'autre dés Princes ne soit averti . . ." [72] and a Franco-Dutch treaty of 1662, nullifying past letters between the two parties for whatever cause issued, provided that none could be issued in future except after manifest denial of justice "lequel ne pourra êtretenu pour verifié, si la requête de celui qui demande lesdites Représailles n'est communiquée au Ministre qui se trouvera sur les lieux de la part de l'Etat contre les Subjects duquel elles devroient être données, afin que dans le terme de quatre mois, ou plutôt s'il se peut, il le puisse informer du contraire, ou procurer l'accomplissement de justice qui sera deu." [73] Article III of the treaty of Utrecht summarizes the results of more than one hundred years of the development of this function. "Il est stipulé qu'à l'avenir l'une des deux puissances ne délivera aucune lettre de Représailles contre les sujets de l'autre, s'il n'apparâit auparavant

70. Mas Latrie, *op. cit.*, pp. 26, 27, 58.

71. I. S. Leadam and J. F. Baldwin, *Select Cases Before the King's Council 1243–1482* (Cambridge, Mass., 1918), p. cvi.

72. Dumont, *op. cit.*, vol. V, part II, p. 63.

73. Godefroi d'Estrades, *Lettres, Memoires et Negociations* (London, 1743), vol. II, pp. 11, 12.

d'un délai ou d'un déni de justice manifeste, ce qui ne pourra être tenu pour constant, à moins que la requête de celui qui demandera des lettres de Représailles n'ait été rapportée ou représentée au ministre ou ambassadeur qui sera dans le pays de la part du prince contre les sujets duquel on poursuivra lesdites lettres, afin que dans l'espace de quatre mois il puisse s'éclairer dit contraire, ou faire en sorte que le défendeur satisfasse incessamment le demandeur." [74]

Although definition of the procedure to be followed before a denial of justice could be said to exist and restriction or abolition of reprisals between signatory powers were perhaps the most important subject of treaty concern, other matters were often dealt with. In the fourteenth century, particularly during the reign of Edward II, frequent attempts were made by England to prevent large scale reprisals by the wholesale settlement through negotiation of existing claims.[75] Typical of these proceedings were negotiations with Flanders which were carried on without very much success for some twenty years. Periodically, truces were arranged, ambassadors were appointed, and safe-conducts were granted to the merchants of each country so as to enable them to present their claims in the courts of the other. In the intervals, letters of reprisal were granted and seizures continued as they had in the past.[76] Similar negotiations with Prucia were more successful and were closed in 1388 by a treaty which provided for the release of goods seized in reprisal and the hearing of grievances by the respective rulers.[77]

In 1495 a treaty between England and Austria provided that "all and singular, the Letters of Reprisals, Mark and Countermark, already granted or issued out of the Chancery, or any other Court, of the aforesaid Princes, or their Predecessors, for the Prosecution of any

74. *A General Collection of Treaties,* vol. III, p. 33. See also treaties between England and France in 1632, Dumont, *op. cit.,* vol. VI, part I, p. 33, and in 1667, *A General Collection of Treaties,* vol. I, p. 133, and also between France and the United Provinces in 1678, Dumont, *op. cit.,* vol. VII, part I, p. 358, and in 1697, Dumont, *op. cit.,* vol. VII, part II, p. 386.

75. An English proclamation regarding negotiations with Brabant in 1308 declared that they were undertaken because the king preferred "that the merchants shall be satisfied amicably rather than by such arrests and distraints, by reason of the grievous damage that may happen through such arrests to merchants on both sides. . . ." *C.C.R. Edw. I,* 1302–1307, p. 110.

76. *C.C.R. Edw. II,* 1307–1327, *passim.*

77. *C.C.R. Rich. II,* 1385–1389, *passim; C.P.R. Rich. II,* 1388–1392, *passim.*

Person, or for any cause whatsoever, shall be suspended; nor shall it be lawful to put any of them in execution, unless it shall be otherwise ordained, upon their Merit, at a Trial held in a Diet specially deputed for this purpose by the said Princes." [78]

Occasionally individual cases were dealt with by treaty. Thus the Treaty of Peace and Alliance of 1421 between Henry V of England and the Doge of Genoa provided that William Waldern, who had been granted letters of marque against the Genoese, was to receive annual compensation from Genoa until his loss had been made up.[79] Similarly the reprisals against the Spanish issued on behalf of Cardinal de Lenoncourt were discussed in the negotiations between France and Spain at Cambrai in 1545.[80]

As has been pointed out, the Italian states as early as the twelfth century had embarked upon the process of abolishing reprisals by treaty and the practice became even more common in thirteenth-century England.[81] Such treaties were increasingly common outside Italy also,[82] but, judging from the frequency with which reprisals occurred, many of these pacts must have been quite unsuccessful.

Somewhat similar to treaties abolishing reprisals altogether were those that limited reprisal seizures to the goods of the guilty party or his guarantors or agents. Of this nature was the Anglo-French treaty of 1514 which declared: "No letters of marque and reprisals

78. *A General Collection of Treaties,* p. 18.

79. *C.S.P. Milan II,* 1385–1618, pp. 3, 4.

80. Dumont, *op. cit.,* vol. IV, part II, p. 293.

81. Sereni, *op. cit.,* p. 48, cites among twelfth century treaties those between Bologna and Modena, 1166; among the members of the Lombard League, 1168; between Venice and Rimini, 1170; Venice and Cesena, 1173; Venice and Verona, 1175; Ferrara and Brescia, 1195; Ferrara and Modena, 1198. Thirteenth century Italian treaties included those between Bologna and Bergamo, 1203, Ferrara and Mantua, 1208, Florence and Prato, 1212, *idem;* Florence and Pisa, 1214, Sanborn, *op. cit.,* p. 229; Florence and Bologna, 1216, Mas Latrie, *op. cit.,* p. 99; Florence and Perugia, 1218, Sereni, *op. cit.,* p. 48; Venice and Aleppo, 1229, Sanborn, *op. cit.,* p. 228; Florence and Orvieto, 1229, Florence and Citta di Castello, 1232, Florence and Siena, 1237, Sereni, *op. cit.,* p. 48.

82. See, for example, England and Flanders 1406 and 1417, Dumont, *op. cit.,* vol. II, part I, p. 305, part II, p. 91; England and Flanders in 1478 (for a period of six years), H. E. Malden (ed.) *The Cely Papers* (London, 1900), p. XXII; Morocco and the United Provinces in 1610, Bynkershoek, *op. cit.,* vol. II, p. 135; Dumont, *op. cit.,* vol. V, part II, p. 158; Munster and Emden in 1669, *ibid.,* vol. VII, part I, p. 123.

are to be given to the subjects of one of the contracting parties, except in case of denial of justice, and even then only against the principal delinquents and their agents." [83] This provision, the subject of a series of sixteenth-century Anglo-French treaties,[84] was echoed in a treaty between France and Spain in 1525 providing that marque and reprisals "ne seront baillées ny octroyées par lesdits Princes ny leurs Chanceliers, si n'est seulement contre les principaux delinquants & leurs biens, ou leurs complices & fauteurs; & cela seulement en cas de manifeste denegation de Justice: delaquelle denegation de Justice, les poursuivants desdites marques & représailles, avant que les obtenir, feront apparior par Lettres de sommation & requisition d'icelle Justice, tout ainsi & en la forme & manière qu'il est de droit requis." [85]

Less drastic were the seventeenth-century treaties confining seizures to the high seas except where the goods of the actual offenders were found in port [86] and prohibiting the seizure of private goods toward payment of public debts.[87]

In the middle of the eighteenth century, many treaties were signed abolishing seizures of private property for the debts of others [88] but

83. *C.S.P. Anglo-Sp. Negots.*, 1509–1525, p. 231. Also of interest are similar treaties signed between Italian and Arab states including those between Genoa and Tunis in 1236, 1250, and 1272, between Venice and Tunis in 1231, 1251, 1271, 1305, 1317, 1392, and 1438, and between Pisa and Tunis in 1397, M. L. de Mas Latrie, *Traités de Paix et de Commerce et Documents Divers Concernant Les Relations des Chrétiens avec Les Arabes de L'Afrique Septentrionale au Moyen Age* (Paris, 1865), pp. 93, 99.

84. Treaty of 1546, Nys, *Les Origines*, p. 75; treaty of 1559, *A General Collection of Treaties*, p. 46.

85. Dumont, *op. cit.*, vol. IV, p. 400; see also similar provisions in a treaty signed by France, Spain, and Savoy in 1598, *ibid.*, vol. V, p. 561.

86. Treaty between France and England, 1632, Dumont, *op. cit.*, vol. VI, part I, p. 33; Treaty between France and England, 1669, Jean Colbert, *Lettres, Instructions, et Memoires de* (Paris, 1861–1873), vol. II, part 2, p. 809.

87. United Provinces and France in 1678, Dumont, *op. cit.*, vol. VII, part I, p. 358; United Provinces and France in 1697, *ibid.*, vol. VII, part II, p. 386; United Provinces and Spain in 1714, *ibid.*, vol. VIII, part I, p. 429.

88. de Martens, *op. cit.*, p. 14, cites, as containing this provision, treaties between the following: France and the United Provinces in 1734; France and Denmark in 1742; Sweden and Sicily in 1742; the United Provinces and Sicily in 1753; the United Provinces and the United States in 1783; Sweden and the United States in 1783; Prussia and the United States in 1785; England and France in 1786; France and Russia in 1787; Russia and Sicily in 1787; and Russia and Portugal in 1787.

since private reprisals were practically extinct by the beginning of the century these treaties were merely the formal recognition of an existing situation.

Local Regulation

Where treaty regulation tended to be concerned primarily with denial of justice and restrictions on the exercise of reprisals, the establishment of standards of enforcement was largely the result of local regulation. Such international uniformity of practice as developed may be traced in part to the international character of the mercantile community with its interest in the establishment of uniform standards, in part to fear of counter-reprisals should obvious injustice be done, and in part to the fact that the rules were generally common sense demands for honesty and good book-keeping in the execution of letters.

A letter of reprisal issued on behalf of Peter le Manner issued on November 14, 1308, is probably as complete procedurally as any letter of the seventeenth century. It was, first of all, an order from the king to certain specified individuals, "the bailiffs of the fairs of Westminster," to arrest the goods of a particular group, the merchants and others of Flanders, to the specified value of £140, the amount of which Peter had been robbed.[89] Subsequent action taken by the officials named was reported to the king in the form of a list of the goods seized and the names of the owners. The king, thereupon, ordered a full valuation of the goods to be made by native and foreign merchants in the presence of the owners. Goods to the value of £140 were to be delivered to Peter; the residue was to be released and restored to its owners.[90]

In the fifteenth century, when the authorization of private seizures began to replace orders to officials to stay ships and goods, letters of reprisal were much less detailed in the matter of procedural requirements than those of the earlier period exemplified by the license issued to Peter le Manner. Generally they mentioned only the persons

89. The case casts an interesting sidelight on the procedure by which individuals whose goods were unjustly seized in the name of reprisal could secure redress. It describes a previous seizure in reprisals against Flanders of the goods of one Peter Galewar who obtained their release by showing that he was a resident of a town belonging to France and not to Flanders.

90. *C.C.R. Edw. II*, 1307–1313, pp. 82, 83, 126.

against whom the seizure was to be made and the amount to be taken. Clauses calling for submission of records, judgment of proceedings, and so forth are absent and it seems justifiable to conclude that the substitution of private for state action weakened state control over the whole procedure for some time. It is not until the sixteenth century that one finds again in letters and general orders the careful attention to administrative detail that characterized the earliest period. In all periods, however, although devotion to regularity and detail might waver, the principles on which regulation was based remained the same.[91]

Reprisals could be authorized by the sovereign power only.[92] "For one who has a superior cannot violate the remedies of law on his own authority. Therefore only one who has no superior, both in law and in fact, may declare reprisals." [93] The sovereign power, on its side, was in some degree responsible for relieving the injured subject for, as an early case put it, the king was "debtor to his subjects in showing justice." [94] The king, however, was under no obligation to grant reprisals and might even limit his power to do so by granting charters exempting men of certain towns or countries from such seizures. Thus, when, in 1320, an English merchant argued that the men of Ypres could not claim exemption from reprisals on the grounds of the king's charter, saying "that such arrests are the remedies due of right to the king's subjects" Parliament agreed to the exemption "because such arrests proceed from the king's grace and not of the right and custom of England." [95] On other occasions rulers did not hesitate to

91. For the sake of clarity in discussing these principles, no great stress will be laid upon chronological divisions but the decline in English standards of enforcement in the early period of private seizure should be kept in mind.

92. The sovereign, of course, was not necessarily a king except in England and later France. No references were found to requests or reprisals in the name of the Emperor but such references to the Count of Flanders, the rulers of the Italian city states, the Duke of Brittany, etc., are common. In France, the privilege of issuing reprisals was reserved to the king alone by an edict of Charles VIII in 1485. Prior to this enactment the privilege had been shared by governors and parlements. De Martens, *op. cit.*, p. 11.

93. da Legnano, *op. cit.*, p. 308. See also Molloy, *op. cit.*, p. 15.

94. Roger de Sydesterne et al v. Boulogne, *C.P.R. Edw. III*, 1343–1345, p. 391. See also a similar statement by a number of admiralty judges in 1650, *C.S.P. Dom.*, 1650, p. 380.

95. Perota Brun v. the Flemish, *C.C.R. Edw. II*, 1318–1323, pp. 337, 8.

refuse letters of reprisal or suspend their operation when it suited their political convenience to so do.[96]

Early letters of reprisal generally authorized stay of the goods of "merchants and men" of the town or country under the rule of those responsible for the denial of justice. The very general terms of this description are some warrant for believing that citizenship was disregarded in favor of domicile. This is supported by Molloy's apt statement: "It is not the place of any Man's Nativity, but his Domicil; not of his Origination, but of his Habitation, that subjects him to Reprise. The Law doth not consider so much where he was Born, as where he lives, not so much where he came into the World as where he improves the World." [97] Later grants, however, generally specify that seizures are to be made of the property of "subjects" or "men" of a certain ruler. An exception is the letter on behalf of William Waldern authorizing him "to seize any Genoese or inhabitants of Genoa." [98] Two cases were found mentioning naturalized citizens. In the late sixteenth century letters of reprisal were granted to Martissans de Harques against all English merchants "non domiciliéz et residens en France . . ." and he was empowered to seize ships and goods belonging "aux Anglois non regnicoles ny naturilisez. . . . " [99] In 1626 an English order to stay ships and goods in reprisal was directed against French subjects, born or naturalized.[100]

It was an interesting feature of private reprisals that, almost in-

96. See especially George Henley v. the Dutch. Henley was granted letters of reprisal his case having been upheld in the court of Admiralty but his letters were suspended because of a shift in political favor away from the Spanish and toward the Dutch, *C.S.P. Ven.*, vol. XXIV, 1636–1639, p. 429.

97. Molloy, *op. cit.*, p. 20. It was not until the end of the eighteenth century that, as a result of treaty stipulations, similar principles were applied to the treatment of enemy private property within belligerent jurisdiction. The principle that belligerent owned private property was immune from seizure when located on the territory of the enemy did not survive World War I unscathed, liquidation of enemy enterprises during that conflict and the settlements which followed it amounting, in many cases, to virtual confiscation. See G. Butler and S. Maccoby, *The Development of International Law* (London, 1928), pp. 196–8; John Bassett Moore, *International Law and Some Current Illusions* (New York, 1924), pp. 13–25.

98. *C.P.R. Hen. IV*, 1408–1413, p. 461. See Clark, *op. cit.*, p. 713.

99. Laffleur de Kermaingant, *Mission de Jean de Thumery Sieur de Boissise 1598–1602*, pp. 274–6.

100. *A.P.C. Chas. I*, 1626, pp. 204–5.

variably, seizures were made of the goods of the people of a state not those of its ruler. This was partly due, no doubt, to the greater danger of war should royal property be seized.[101] Molloy suggests also that rulers seldom possess anything that the injured may easily come by "whereas those private Men whose commerce are various, may be catcht for recompence, sometimes with the greatest of ease and freest from danger." [102] In 1569, however, William and George Winter were empowered to seize the ships and goods of the king of Portugal as well as those of his subjects. This unusual authorization may be partially explained by the fact that Winters had actually been robbed by public ships of Portugal [103] but since this, in itself, was not uncommon, other motives, which do not appear in the records, must have been present.

Seizure of the goods of persons not included in the authorization was, of course, a practice akin to piracy and was strictly forbidden. An Elizabethan proclamation, provoked by the repetition of such illegal acts, ordered stringent penalties for using letters of reprisal for unauthorized seizures, "complaint having been made that English subjects trading to the Straits, or having letters of reprisal against subjects of Spain for enjuries and cruelties, having taken goods belonging to friends of Her Majesty, enquiry is to be made, and all subjects to be prohibited from such wrongs, especially against the Signory of Venice or Grand Duke of Tuscany, on pain of death to the takers and abettors. . . ." [104]

Naturally, seizures carried out by officials of a municipality were made only within their jurisdiction. When a large sum was involved duplicate orders were often issued to the officials of several municipalities, each town being allotted a certain amount. Thus, in 1315, the bailiffs of St. Ives were ordered to seize Flemish goods to the value

101. Protesting against an English seizure of French ships in reprisal, Louis XIII declared that it was unheard of for any nation to extend reprisals to the property of a sovereign. "Otherwise there would be no difference between letters of reprisal and a declaration of war." *C.S.P. Ven.*, vol. XXIX, 1653–1654, pp. 18, 19 and *Recueil des Instructions données aux Ambassadeurs et Ministres de France 1648–1789* (Paris, 1929), vol. 24, p. 159.

102. Molloy, *op. cit.*, p. 16.

103. Marsden, *op. cit.*, vol. I, pp. 184–7. See also *The Mercury* (c. 1650), *ibid.*, vol. II, pp. 3, 4.

104. *C.S.P. Dom. Eliz.*, 1598–1601, p. 153.

of £200, the sheriffs of London, £1,000, the sheriffs of Great Yarmouth, £300, of Ipswich, £300, and of Lynn, £200, to compensate the Countess Alice for the robbery of a ship worth £2,000.[105]

With the growth of the practice of authorizing private seizures, it became necessary to specify the place where such seizures might be made. John Hampshire and Henry May were authorized to seize the bodies, ships, and goods of any subject of the Duke of Brittany "wheresoever they may be found within our realms, lordships, lands, powers, and territories, as well on this side as beyond the sea, by land, sea or water, within liberties or without. . . ." [106] This was the common phrase in the fifteenth and sixteenth centuries. In the seventeenth century, however, in accord with treaty provisions, seizures in ports or harbors were frequently prohibited "unlesse yt be the shipps or goods of the party that did the wronge, upon due prooffe to be made upon oath in our said court of Admiralty." [107]

The amount to be seized was invariably stated and generally included loss plus reasonable costs. The fidelity with which this limitation was carried out must necessarily have depended on the provisions for regulation.[108] As has been pointed out, fifteenth- and early sixteenth-century letters tended to be deficient in this respect. In the fourteenth century, however, letters authorizing stay of goods provided detailed regulations for appraisal, notification of authorities, and safekeeping of goods, largely, no doubt, in an attempt to protect the state against counter-claims.

Goods seized were appraised on oath in the presence of the owners and of native and foreign merchants. In 1309, Edward II ordered a re-evaluation of Flemish goods seized on behalf of Henry Scof since the previous evaluation, having been made in the absence of the own-

105. Gross, *op. cit.*, p. 95.

106. Bland, Brown, and Tawney, *op. cit.*, p. 191; *C.P.R. Hen. VI*, 1446–1452, pp. 104, 5.

107. Marsden, *op. cit.*, vol. I, p. 501.

108. The consequence of seizure in excess seems to have been merely the return of the surplus. See Lawrence Elys v. the Flemish, *C.C.R. Edw. II*, 1307–1314, p. 34; Adam le Clerk v. Men of Grippeswald, *C.C.R. Edw. II*, 1318–1323, p. 21; Reprisals against Prussia, *C.C.R. Rich. II*, 1385–1389, p. 146; the case of William Coleston, *A.P.C. Eliz.*, 1588, p. 228; Peter Tromley v. the French, Marsden, *op. cit.* vol. I, p. 289.

ers, was an improper one.[109] Seizures were reported by responsible officials in the most minute detail. Having been ordered to arrest Friesland goods to the value of £75 for the benefit of Henry Poteman, the bailiffs of London reported to the king first, the seizure of a ship and its tackle worth £50, and then, of two chests, two featherbeds, and two cauls which were appraised in the presence of their owners as worth 17s. 4d.[110] The officials ordered to seize goods of the lieges and tenants of the Count of Vertu to the value of £3,200 on behalf of Nicholas Collyng were "commanded to keep the said goods when arrested until further order, to cause such of them as cannot be kept without loss to be appraised and sold in their presence on the oath of merchants, English and foreign, chosen by both sides, viz., Nicholas Collyng and his partners, on the one side, and the merchants whose goods they are on the other, and the money put into the keeping of the mayor and sheriffs aforesaid . . . and that indentures quadripartite be made testifying what goods have been so arrested, their value, the names of those from whom they were taken, in whose custody put since arrest, which of them appraised and sold, to whom, at what price, by whom appraised etc. one part of the indentures to be lodged with the king and council in the office of his privy seal, a second with the mayor and sheriffs . . . a third with Nicholas Collyng and his partners, and a fourth with the lieges and tenants of the said count." [111]

Special care was taken either to preserve the goods seized or to arrange for the sale of perishables. The sheriffs of London were ordered to appraise and sell thirty pieces of cloth and certify their proceedings to the king "as by command of the king the sheriffs lately arrested the cloth in name of reprisal because of the disputes which have arisen between the king and them of Sprucia; and by particular report the king has learned that owing to careless keeping the same has been so damaged by worms and otherwise that it is like to perish, if the king lend not a helping hand." [112]

To provide the state with further protection against claims, opportunity for protest was afforded the merchant who felt that his goods

109. *C.C.R. Edw. II*, 1307–1313, pp. 171–2.
110. *Ibid.*, p. 119.
111. *C.P.R. Rich. II*, 1391–1396, p. 38.
112. *C.C.R. Rich. II*, 1385–1389, p. 358.

had been seized illegally. Merchants, who asserted that as members of the Hanse their goods were exempt from seizure by charter, were given a hearing through Chancery proceedings [113] as were the burgesses of St. Valery who claimed that their goods, seized on behalf of an English merchant, had been arrested unjustly.[114] Similarly, Portuguese merchants claiming exemption from French reprisals were heard in the Parlement of Paris.[115] In 1309, when seizures of the goods of the subjects of the Bishop of Utrecht were authorized on behalf of one of the bishop's creditors, merchants of Groningen whose goods were held demanded their return on the grounds that Groningen was under the temporal sovereignty of the king of Almain and was ruled by the bishop only in spiritual matters.[116] This contention was found to be true by a commission of merchants of Almain and Brabant "elected and sworn with the consent of the parties" and the goods were ordered released.[117]

After a period in which private seizures were licensed without detailed provisions for the evaluation and disposal of goods, the English records in the second half of the sixteenth century show a revival of the state's concern with those questions and also the growing subordination of reprisals to the jurisdiction of the Admiralty.[118] Thus a letter of reprisal granted to John Kitchen against the Spanish in 1585 contained the provision "that they shall bringe suche shipps and goods as they shall soe happen to take and apprehende of the subjects of the king of Spayne to some ports of this here Majestie's realme of Englande; and not to break bulke before the Vice Admirall of the same porte be made acquainted therewithe, or his deputye, and other pub-

113. Hubert Hall, *Select Cases Concerning the Law Merchant 1239–1633*, vol. II, p. XCII. Wm. de Wyddeslade v. Hainault, 1318, *C.C.R. Edw. II*, 1318–1323, p. 46.

114. *C.C.R. Edw. II*, 1313–1318, p. 48.

115. Adam de Bans v. the Portuguese, Thierry, *op. cit.*, pp. 715–18.

116. Hall, *op. cit.*, pp. 81, 2. *C.C.R. Edw. II*, 1307–1313, p. 186.

117. *C.C.R. Edw. II*, 1307–1313, p. 186.

118. It should be noted that, at the same time, wartime privateering and prize cases were coming under the exclusive control of the Admiralty and that privateers and public vessels were being similarly limited with regard to breaking bulk and other aspects of wartime capture, Marsden, *op. cit.*, vol. I, p. XXII. In France, an edict of 1584 required prize proceedings before the Admiral or Vice-Admiral regardless of whether seizures were made under color of war or otherwise, J. M. Pardessus, *Collection des Lois Maritimes* (Paris, 1837); vol. 4, p. 303.

lique officers of the same porte, and a trewe inventory taken thereof, and an apprayesment made of the same goods by six honeste men, inhabitants of the sayde port; and that the same inventory and praysmente shalbe retourned unto her Majestie's highe courte of Thadmyralty aforesayd within six weeks nexte after ensueinge." [119]

An Elizabethan order specifically states the interest of the ruler in legal and accurate proceedings. Edward Preston and others, granted reprisals against the Portuguese, were ordered to have "their proofes . . . duely made and the saide goodes indifferently praised and good bandes taken of the parties to save her Majestie harmeless, in case their demaundes shall happen hereafter to be disproved." [120]

A Privy Council order regarding reprisals in 1585 required all those to whom letters were issued to give bond to carry all ships and goods to England, not to break bulk before notifying the port authorities, to have inventory taken and appraisal made by six honest men of the port, and to return the inventory to the High Court of Admiralty within six weeks. After fulfillment of these conditions the goods might be retained and sold.[121] In 1589 the Admiralty was given fuller control over reprisals by the requirement that all captures were to be brought before it for judgment as to whether they were lawful prize.[122]

Similar developments are to be found in other countries. A French law of 1681 provided that "Les prises faites en mer en vertu de nos lettres de représailles seront amenées, instruites et jugées en la même forme et manière que celles qui auront été faites sur nos ennemis." To ensure lawful procedure "Les impetrans des Lettres de Représailles seront tenus de les faires Enregistrer au Greffe de l'Admirauté du lieu où ils feront leur Armement, & de donner caution jusques à concurrence de moitié de la valeur des effets depredez pardevant les Officiers du mesme Siege." Yet another article sought to prevent seizure beyond the authorized sum through Admiralty supervision declaring "Si la prise

119. Marsden, *op. cit.*, vol. I, pp. 239–40.

120. *A.P.C. Eliz.*, 1575–1577, p. 57. For a French letter requiring appraisal see Nicholas de Chesnaye v. the English in 1512, Alfred Spont, *Letters and Papers relating to the War with France*, 1512–1513 (Navy Records Society, 1897), pp. 19, 20.

121. Julian S. Corbett, *Papers Relating to the Navy During the Spanish War*, 1585–1587 (Navy Records Society, 1898), pp. 36–8.

122. Marsden, *op. cit.*, vol. I, p. 252. See also the Instructions of 1625, *ibid.*, pp. 410, 11.

est declarée bonne, la vente en sera faite pardevant le Juge de l'Admirauté & le prix en sera délivré aux impetrans sur-estant moins ou jusques à concurrence de la somme pour laquelle les Lettres auront esté accordées, & le surplus demeurera deposé au Greffe pour estre restitué à qui il appartiendra." [123]

In November, 1655, after the last remnant of the authority of the Dutch West India Company in Brazil had been lost with the loss of Recife, the States General were informed by the Commissioners of the Admiralty of Amsterdam that, due to these circumstances, letters of reprisal granted by the West India Company were no longer valid and would have to be re-issued. This being the case, the Commissioners advised that future issuance be placed in the hands of the colleges of the admiralty and that those to whom letters were issued be required to "give security that they will carry all prizes . . . together with the papers and writings belonging thereunto, not diminishing nor disposing of the same without the most pressing and unavoidable necessity, to the college of the admiralty of those quarters where the same are issued from, in order to receive judgment of the lawfulness or unlawfulness of the same. . . ." [124] In this way, the Commissioners held, the interests of the state would be served since, without such regulation "under the pretence of the said reprisals many outrages may be committed against those that are neutral, and ships and goods taken right or wrong be sold abroad without any form of justice or inquiry, to the prejudice of the owners thereof, whereof several reports are heard already . . . From whence many inconveniences, to the disrespect and prejudice of this state, and the inhabitants thereof, as well by retorsions and reprisals, as otherwise, may arise . . ." [125]

Although primarily concerned with procedure, local regulation often provided an important limitation on the issuance of reprisals by exempting from the effects of reprisals particular individuals, national groups, or commodities. In 1325 Hildebrand Suderman was exempted from English reprisals for life as one of the king's merchants specially attendant on his affairs.[126] In 1328 a similar grant was made

123. *Ordonnance de la Mer,* Tome III, Titre X, IV, V, VI.

124. Ferdinand de Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations* (Leipzig, 1856), vol. II, p. 57.

125. Thomas Birch, *A Collection of the State Papers of John Thurloe* (London, 1742), vol. IV, p. 193.

126. *C.P.R. Edw. II,* 1324–1327, p. 128.

to Peter de Sancto Fusiano for one year.[127] In 1337 Jaques and Bérenger Armargos, merchants of Arragon, were exempted from French reprisals against their compatriots as they and their factors had lived and carried on business in Paris for twenty-eight years.[128] Similarly, in 1340, certain Genoese were granted the title of Bourgeois of Paris and exempted from all reprisals against Italians.[129] Charters were also granted by one country exempting all the merchants of another from reprisals,[130] with such charters frequently being granted to groups whose commercial or financial activities were of particular value to the country granting the exemption. Thus in England, the Lombards, the financiers of London, were exempt from reprisals while a similar privilege was accorded to the Jews in France.[131]

Similar considerations of profit inspired exemption from reprisals of certain commodities or of members of a particular trade. In 1311, for example, the bailiffs of Great Yarmouth were ordered not to execute reprisals on any property of foreign fishermen "as the king has received complaint from men of that town that . . . the fishermen . . . by whose fishing the fairs of the said town were wont to be principally maintained during the fishing time, dare not come to Yarmouth with their boats or ships and dare not there fish, but withdraw themselves from that port for fear of arrest, to the damage of the said fairs and of the community of the said town and the parts adjoining." [132] In 1321 in order to encourage the bringing of silver to the exchanges of London and Canterbury that commodity was exempted from reprisal.[133]

127. *C.P.R. Edw. III*, 1327–1330, part II, p. 303.

128. Jules Viard, *Documents Parisiens du Règne de Philippe VI de Valois* (Paris, 1899), vol. I, pp. 307, 8.

129. *Ibid.*, vol. II, pp. 73, 4.

130. Merchants exempted from English reprisals in the fourteenth century included those of Ypres, *C.C.R. Edw. II*, 1313–1318, p. 500; Lubeck, *C.C.R. Edw. II*, 1318–1323, p. 67; Brabant, Lorraine, and Limburgh, *C.P.R. Edw. III*, 1343–1345, p. 347; Dynaunt, *C.P.R. Edw. IV*, 1345–1348, p. 70; and Aragon, *C.P.R. Edw. III*, 1358–1361, p. 255. See also charter granted to the merchants of Lubeck by Henry III, Nys, *op. cit.*, p. 66; French exemptions of the Portuguese in 1341, Thierry, *op. cit.*, vol. I, p. 716*n*; Bulgarian exemption of the Venetians in 1352, Sanborn, *op. cit.*, p. 229; English exemption of the Milanese in 1490, Nys, *op. cit.*, p. 75; Russian exemption of the English in 1555, R. H. Tawney and E. Power, *Tudor Economic Documents* (London, 1924), vol. II, p. 39.

131. Hindmarsh, *op. cit.*, p. 52.

132. *C.C.R. Edw. II*, 1307–1313, p. 364.

133. *C.C.R. Edw. II*, 1318–1323, p. 303.

Enforcement of letters of reprisal at the great fairs might have disastrous effects on major trading centers and so was frequently prohibited.[134] In the early years of the fifteenth century, the fair of Montaignac in Carcassone, at which were accustomed to trade "plusiers et grant quantité de marchans de tout le pays de Languedoc, du Daulphiné, de Viennois, de Piemont, de Prouvence et d'autres parties et countrées voisines . . ." to the great profit of the realm, was threatened with severe loss of patronage due to the taking of reprisals there. Charles VII having been informed of these facts ordered that all merchants attending the fair be exempt from reprisals.[135]

Reprisals in Practice

It is frequently pointed out in criticism of private reprisals that under this system the innocent suffered for the sins of the guilty.[136] But membership in a community may imply responsibility for the actions of that community and it was on this principle that private reprisals were based. The foreign sovereign who authorized the taking of reprisals was not punishing the alleged criminal; he was penalizing the community for what he regarded as its failure to provide redress. The original crime entered into the case only as a measure of what was due to the offended state. The redress exacted of the offending community was the enforced payment to the injured person of the amount that he claimed originally to have lost, in the loss of which he had been confirmed by the community's failure to act appropriately on his behalf and, since the community cannot be punished in the

134. P. Huvelin, *Essai Historique sur le Droit des Marchés et des Foires* (Paris, 1897), p. 443.

135. Academie des Sciences Morales et Politiques, *Collection des Ordonnances des Rois de France* (1887–1908), vol. 19, p. 622. The fair of Champagne in France enforced its own reprisals against defaulting debtors by *défense des foires* or exclusion from the fairs. Procedurally *défense des foires* was similar to other forms of reprisal requiring repealed requests for justice and continued denial of justice, and involving in its effects the members of the delinquent community. Huvelin, *op. cit.*, pp. 427–430.

136. This fact was also a source of some discomfort to contemporary commentators. They agreed, however, that the interests of the community demanded this system although superficially it might seem unfair, da Legnano, *op. cit.*, p. 321; Zouche, *op. cit.*, p. 115; Molloy, *op. cit.*, pp. 15, 16; Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari* (Baltimore, 1912), p. 32.

abstract, the burden fell upon the human beings who made it up. The modern reprisal may equally penalize the community for a crime having its origin in the act of an individual but here the effect is indirect being distributed among all members of the community [137] instead of falling upon some particular luckless merchant and thus, to the contemporary eye, though the principle be the same the practice seems less unjust.[138]

The treaties providing that only the goods of the actual criminal might be seized in reprisal were, of course, a limitation of the theory of community responsibility.[139] Under these treaties the state that had failed to do justice was not really penalized in any way while the

137. The principle of collective responsibility is a continuing one in the history of law and reflects the necessity for determining responsibility in order to secure redress. Naturally, the more easily responsibility may be attributed to a specific individual or group, against whom well-understood action can be relied upon to produce the desired results, the less necessary will it be to penalize the community as a whole. Under systems of primitive law, the murder of a member of one clan by a member of another was punished by the murder of some other member of the guilty clan, the latter being bound to accept the act as one of justice. A. R. Radcliffe Brown, "Primitive Law," *The Encyclopedia of Social Sciences*, vol. IX, p. 204. In modern times extradition treaties and other legal techniques have made it possible to fix responsibility directly on the individual involved and community responsibility is engaged only when the state fails to fulfill its obligations. In wartime, however, when such situations as belligerent occupation confuse the legal picture, application of the principle of collective responsibility may offer the only alternative to the complete disappearance of law and order. Cf. Hague Conventions of 1889 and 1907, *Laws and Customs of Wars on Land*, Art. 50, and U.S. War Department, Basic Field Manual, *Rules of Land Warfare*, FM 27-10 (1940), Arts. 343-4, 358.

138. An exception to this statement of modern practice, brought to the writer's attention by Professor Joseph P. Chamberlain, is to be found in Section IV Article 297 (e) of the Treaty of Versailles which provides that "The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914. . . . This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State." This resort to reprisals against private property is somewhat modified by the provision in (j) that "Germany undertakes to compensate her nationals in respect of the sale or retention of their property rights or interests in Allied or Associated States." For American practice see E. M. Borchard, "Reprisals on Private Property" 30 *AJIL* (1936), p. 109. It is interesting to note that the Versailles precedent has been followed in the provisions of the satellite treaties.

139. *Supra* p. 31.

wronged individual was further hindered in obtaining restitution by being forced to seek out the wrongdoer himself. More fully expressive of the theory of community responsibility were attempts in certain thirteenth-century charters to ameliorate the harm done to individuals by reprisals. Typical of these was that granted to Leicester in 1273 which read: "Be it known that if any of the community or liberty of Leicester go to Chester or Shrewsbury or any other market town to make merchandise and be distrained for the debt of any neighbour of his and not for his own debt, let him come home and point this out to the bailiffs of the lord earl, and the bailiffs shall give warning to him who owes the debt, once, and again, and if he do not make delivery of the distrained goods of his neighbour, distrained on his account, let the bailiffs close his house, whoever he may be, with bolts and forbid him ingress until he shall have delivered his neighbours and shall have made satisfaction for his debt." [140] Here the basic principle of reprisal against any member of a theoretically guilty community is retained while, in practice, the innocent individual secures redress for his loss from the original criminal.

Acting as they did upon foreign goods in ports or on the high seas, reprisals had an unfortunate effect on international trade into which they introduced a strong element of uncertainty. It is not surprising, therefore, to find the first attempts to abolish them among the trading centers of Italy and the Hanse.[141] Wholesale abolition, however, was too uncommon to be of much influence and more important, from the merchant's point of view, were the royal exemptions from reprisals granted sometimes to individuals and more frequently to the merchants of a given town or country.

Reprisals were frequently as detrimental to the trade of a country issuing them as they were to that of the country against which they were directed. Refusing requests for the seizure of the goods of Gyesbryght van Wynsbarge for this reason, the Lord Lieutenant of Calais declared: "yff soo be that Gyesbryght schuld be arestyd here and trublyd hytt schuld causse at grett inconvenyens to the stappull for Gyesbryght

140. Bateson, *op. cit.*, p. 117. See also charters granted to Preston in the 12th century, *ibid.*, p. 126, to Grimsby in 1259, *ibid.*, p. 116, to Yarmouth in 1272, *ibid.*, p. 117, and a statute of Narbonne in 1315 imposing a tax in order to indemnify those of its citizens who had suffered from reprisals, Mas Latrie, *op. cit.*, p. 81, Spiegal, *op. cit.*, p. 69.

141. Sanborn, *op. cit.*, p. 143, 4, 230. Nys, *op. cit.*, p. 68.

and his fellow be the men that doth greter fett of any merchauntes that comyth heder for the goodes that they have bowght here thys zere drawyth abowe XXV M[l]li ster: wherfor yff they schuld be stoppyd ther wold come noo moo merchauntes heder the whych schuld cause a grett stopp and yff merchauntes straungers myght nott resortt heder that men myght make sale of her goodes they cowde make noo payment unto the soudears of their wages." [142]

Naturally the early practice of staying ships and goods in port reacted even more unfavorably on the commerce of the enforcing state than did the later authorizations of private seizures on the high seas. It is obvious that the latter method, although detrimental to maritime security as a whole, need not necessarily discourage trade to a particular country as seizures in the port of that country would. While engaged in negotiations with France in 1599, Sir Henry Neville wrote "I wish it to be especiallie provided for in the Treaty, that there shall be no Letters of Mart or Reprisall executed eyther upon the Land or in any Port, but upon the Sea only; for this is a Poynt our Marchants do especially feare, and therefore desyre yt may be prevented." Achievement of this aim would be of particular advantage to the English "because we are stronger than the Frenche at Sea, and therefore not so subject to Reprisalls there; and have more Goods and Commodities alwayes in their Countrie, than they have in ours, and thereby more in Danger of Seasure at home." [143] Doubtless, it was for reasons similar to these that the original shift from reprisals in port to reprisals on the high seas was made.

Nevertheless, the effects of private reprisals upon trade were not wholly bad since the fear of reprisals was often sufficiently strong to act as a deterrent to illegality and a stimulus to justice. In 1292 Thomas Lucas was confined in the Tower for leaving the fair at Lynn, contrary to his promise, with merchandise not yet paid for. Replying to the king's inquiry as to the cause of the fugitive's arrest, the constable of the Tower declared "that citizens complained that unless speedy remedy were made for a deed of this kind, their goods in foreign parts might be arrested. . . ." [144] In 1410 English merchants petitioned for

142. Malden, *op. cit.*, p. 146.

143. Edmund Sawyer, *Memorials of Affairs of State in the Reigns of Queen Elizabeth and King James I Collected Chiefly from the Original Papers of Ralph Winwood* (London, 1725), vol. I, pp. 73, 4.

144. Hall, *op. cit.*, vol. II, pp. 175, 6.

the restoration of the property of certain Flemish in accord with a judicial decision that had been made some time before, saying: "Considerants s'il vous plest, qu'il feusse grant honour que celle restitucion feusse faicte, puis qu'il esteit adjuggee; gar il nest pas adouter que al proschein assembler des Ambassateurs dengleterre et de Flandres, senulle y serra tenuz, ceulx de la partie de Flandres feront tresgraunt clamour et compleint pour le noun restitucion desdicts biens . . . en tant qu'il serra bien trouve que ceulx de Flandres qui ont perdue les dictes [biens] viollent prendre atant ou plus des biens des merchantz dengleterre estans en Flandres sur lexpiracion des dictes trieues, sans ce que parauant le dicte restitucion leur soit faicte. . . ." [145] Similarly London merchants trading to Rouen brought pressure to bear for the release, according to Admiralty Court decision, of a ship of that port for default of which "the French not only detain the Petitioner's ships by way of reprisal, but threaten to arrest their goods and debts throughout that kingdom, which will be the ruin of the petitioners and many thousands of the king's poor subjects who are dependent upon them. . . ." [146]

General histories of the medieval and early modern periods frequently give the impression that "private reprisal" was but another name for piracy. The holder of a letter of reprisal is described as an armed marauder wandering unchecked on the high seas and using his license at will against all weaker than himself. Nor are such critics without evidence to support their contentions. There were, for example, the notorious Bartons who, for thirty-five years, used for piratical purposes letters of reprisal granted them by James IV of Scotland in 1476.[147] Negotiations between France and Spain in the years 1509 to 1511 disclosed that, for the twenty-five years preceding, subjects of both had been using long expired letters of marque as pretexts for robbery on the high seas.[148] In July, 1655, letters of marque that had been issued under the Commonwealth were revoked. "They were granted," it was declared, "to merchants and others who had suffered from depredations and piracies, and could obtain no relief; but

145. M. L. Gilliodts-Van Severen, *Le Cotton Manuscrit* (Brussels, 1896), p. 292.
146. *C.S.P. Dom. Chas. I*, 1625–1626, p. 250.
147. H. R. F. Bourne, *English Seamen under the Tudors* (London, 1868), pp. 51–54.
148. de Maulde-la Clavière, *op. cit.*, vol. I, pp. 232, 3.

his Highness,—finding that under colour thereof, some seize ships of the people of princes and states in amity, to the discouragement of trade and dishonour of the Commonwealth, and that ordinary proceedings have not suppressed these offenses—declares that all letters of marque are revoked from 1 August, 1655. All ships taken after, by virtue thereof, are to be sequestered and returned to their proprietors, on just proof, without any long or chargeable suit at law, and the persons taking them shall suffer death as pirates.[149]

Nevertheless a study of the documents shows a high degree of legality in the execution of such letters as were legitimately issued to private individuals for the redress of private loss. Once the original obstacle was overcome—the existence of the denial of justice established—there were many rules and most of them seem to have been followed. True there were many cases of individual lawlessness such as the ones described but these appear to have been the exception and generally, the fear of counter-reprisals probably tended to check excesses.[150]

The chief objections to such reprisals, however, was not that they were subject to private abuse, not that they involved the innocent, not even that they hindered trade, but that they could so easily become a tool of state policy as distinct from a legal remedy for certain well understood wrongs. In the last analysis, one party to a quarrel made the decision as to the legality of the other's action. On this essentially non-legal basis a whole legal structure was built up that had as its main defect the existence of contention without the existence of judge. When one sovereign state refused to accept the verdict of the other the only resort was to force, that is, to counter reprisals, and these might be but the starting point for a whole series of mutual attacks. When reprisals were convenient, moreover, denial of justice could and did

149. *C.S.P. Dom. Commonwealth,* 1655, p. 240.

150. It must be remembered that, throughout this period, piracy was common in European waters. Judging from the English records most pirates eschewed the protection to be derived from the illegal use of letters of reprisal. Thus references to piracy in the Rolls—and there are many—contain virtually nothing that would link the practice of piracy to the possession of letters of private reprisal. It should also be recalled that lawlessness at sea was stimulated by the privateering which took place in the frequent wars of the period, the letters of marque and reprisal granted to seamen in wartime being of an entirely different character from those granted to aggrieved merchants in time of peace. See *supra* p. 9*n.*

become a highly elastic term. Thus we find that while reprisals were seldom the cause of war [151] they frequently appeared among the factors of aggravation present in tense situations immediately preceding wars. In these circumstances, it was generally apparent that reprisals were being used for political motives without much concern for legality.

Such was the nature of the reprisals between England and France from 1547 to 1549. In 1547 Henry II became king of France and, with the accession of the youthful Edward VI to the English throne, the latter country came under the rule of Somerset, the Protector. Both rulers dreamt of the union of Scotland with their respective countries; Henry while still Dauphin had proclaimed his intention of regaining Boulogne.[152] The origin of the campaign of reprisals and counter-reprisals that took place in the next two years is obscure, each side claiming that its seizures were the consequence of a denial of justice on the part of the other. The scope of the operations may be seen from the reports of the French ambassador regarding ships seized and brought into Dover. On October 18, 1547, he reported, the ships of all French merchants at Dover were seized; on November 9 of the same year a number of French ships seized on the high seas were brought into that port; on September 16, 1548, ten or twelve ships were seized; and three days later the ambassador complained to the Protector of the seizure of twenty or twenty-five French ships, arrested while sailing with a Flemish fleet.[153] The Protector, on his side, complained of numerous "unfounded" seizures [154] and each accused the other of issuing secret orders allowing all ships to make captures.[155] It was not until August, 1549, that a formal declaration of war climaxed this series of mutual depredations and recriminations.

In 1651 a similar "war of reprisals" between England and France, originating in a troubled political situation and expressing itself in unlimited maritime hostilities, led ultimately to war between the Eng-

151. Philip C. Jessup and Francis Déak, *Neutrality: Its History, Economics, and Law* (N.Y., 1936), vol. I, *The Origins*, p. 14.

152. H. M. Gwatkin and J. P. Whitney, *The Cambridge Medieval History* (Cambridge, 1911–1936), vol. II, pp. 486–499.

153. Germain de Lefevre-Pontalis, *Correspondance Politique de Odet de Selve-Ambassadeur de France en Angleterre, 1546–1549* (Paris, 1888), pp. 221, 232, 425, 444–457.

154. *Ibid.*, pp. 245, 276, 301, 335, 336, 350, 365, 386, 394.

155. *Ibid.*, pp. 450, 461.

lish and the Dutch. Not only were letters of reprisal issued to merchants who had suffered loss [156] but also vessels of the fleet were instructed to take French ships wherever found.[157] As a crowning blow to the French, in 1652 Admiral Blake captured a French royal squadron on its way to the aid of beseiged Dunkirk.[158] Since France was already at war with Spain, Mazarin was inclined toward conciliation of the English and peaceful relations were eventually re-established by the Treaty of Westminster. But the Dutch, whose commerce had suffered great damage by reason of British seizure of French goods on Dutch ships, embarked upon an extraordinary naval construction program.[159] Their demands for the abandonment of search and seizure of Dutch vessels proving unsuccessful, they adopted an aggressively independent policy on the high seas and the inevitable clash between armed ships of the two countries created the occasion for the final rupture.[160]

From the point of view of the later development of the doctrine of retaliation, the most significant feature of the private reprisal is that the practice appears to have attained a high degree of uniformity. Its essential features were the existence of a *pecuniary* claim, the failure of the claimant to obtain satisfaction through his own efforts, the subsequent failure of the sovereign's efforts to secure justice for his subject, and, finally, authorization by the sovereign of seizure (whether by state

156. *C.S.P. Dom.* 1650, *passim.*

157. Marsden, *op. cit.*, vol. II, p. 8.

158. Commission des Archives Diplomatiques, *Recueil des Instructions données aux Ambassadeurs et Ministres de France, 1648–1789* (Paris, 1884–1929), vol. 24, pp. 147, 152, 153.

159. A. W. Ward, G. W. Prothero, S. Leathes, *The Cambridge Modern History* (New York, 1903–1912), vol. IV, pp. 470, 471.

160. For other examples of "wars of reprisals" preceding formal declarations see the Anglo-French reprisals of 1326, *C.C.R. Edw. II*, 1323–1327, *passim;* the Anglo-Spanish reprisals of 1585, Corbett, *op. cit.*, pp. VII–XV, 38–48, Marsden, *op. cit.*, vol. I, pp. 236–40, *Cambridge Modern History*, vol. II, pp. 301–4, vol. III, pp. 281–3, 295–7, 493; the Anglo-French reprisals of 1625, *C.S.P. Dom. Chas. I*, 1625–1626, *passim.*, *C.S.P. Venice*, 1625–1626, Introduction and pp. 275, 286, 297, 316; the Anglo-Spanish reprisals of 1625, *C.S.P. Dom. Chas. I*, 1625–1626, *passim*, *C.S.P. Venice*, 1625–1626, pp. 26, 28, 76, Dumont, *op. cit.*, vol. V, part I, pp. 506, 7, *A.P.C. Chas. I*, 1626, vol. II, pp. 364, 5; the Anglo-Spanish reprisals of 1655, Thurloe, *op. cit.*, vol. III, p. 541, *C.S.P. Dom.*, 1655–1656, pp. XV, 2, 3, 40, Marsden, *op. cit.*, vol. II, pp. 23, 4; and the Anglo-Dutch reprisals of 1663, *Cambridge Modern History*, vol. V, pp. 179, 180, *C.S.P. Dom. Chas. II*, 1664–1665, pp. 155, 182, 199, Marsden, *op. cit.*, vol. II, pp. 48, 9.

agent or private individual) of goods of subjects of the offending state to the amount of loss plus reasonable costs. Regulation, both local and in treaty form, although it could not rid the system of all its abuses, kept them well in check and was supported by a strong sense in the community of the dangers of illegality and consequent counter-reprisals. Only when used as a political weapon in "wars of reprisal" did the private reprisal depart from its norms and become unpredictable. And it was this unpredictability that was to become the chief characteristic of the public reprisal which originated in the same period that saw the decline of private reprisals.

CHAPTER II

Early Public Reprisals

Regulation of Procedure

PUBLIC REPRISALS in time of peace differed from private reprisals in that no particular individual was to benefit, no proof of loss was required to obtain a license, seizures were made by public as well as private ships, and no set sum was involved. Apart from these differences, public reprisals of the sixteenth, seventeenth, and eighteenth centuries were similar to private reprisals in form. That is to say, they were justified by a claimed denial of justice and implemented by the seizure of ships and goods in port or on the high seas.

Authorization of public or "universal" reprisals generally opened with a recital of grievances against a nation as a whole, for which grievances it had been impossible to obtain satisfaction. Thus Elizabeth, ordering reprisals against the French, wrote to the Warden of the Cinque Ports, "know you in what sort the French do daylie in sondry places upon the narrow seas, and specially nere the Cinque Ports, take our subjectes' vessels and kepe some of our people as prisoners and others deliver upon ransomes, and yet the king forbeareth to publish any warr against us; Wherefore considering no remedy can be had but by like proceeding, We will that you shall, with some secrecy and spede, procure some such within your jurisdiction as ye shal think mete to repaire to the seas, and to be as bold upon the French kinge's subjectes, using the same in like manner as the French do. . . ." [1]

In 1627 the French declared the sequestration of all British goods in France "Dés lors que les Anglois au préjudice de la Paix . . . ont commencé de depréder nos Sujets à la Mer, d'emmener leurs Vaisseaux & Marchandises en Angleterre arrête . . . & fait confisquer & vendre le tout à leur profit." [2]

1. Marsden, *op. cit.*, vol. I, p. 174.
2. Dumont, *op. cit.*, pp. 506, 7.

The failure of attempts to secure redress were generally mentioned as evidence of the existence of a denial of justice. The Commonwealth, for example, ordered general reprisals against the French because "albeit all faire courses have been taken and observed, according to the forms of Princes and States in amitie, in seeking and demanding redresse and reparation, yet none could be obteyned." [3]

In 1715 Admiral Sir John Norris was ordered to seize Swedish ships because "of late years great number of ships belonging to the British merchants . . . have in carrying on their lawfull trafick to the ports of the Baltick Sea been violently and unjustly taken by men of war or capers belonging to Our good brother the king of Sweden or to his subjects, and have without any good reason or pretence whatsoever with their cargos of a considerable value been condemned and confiscated as lawfull prize even by the direct commands of his Swedish Majesty, to the great and insupportable loss of Our British subjects and notwithstanding that we have caused repeated instances to be made by Our ministers. . . ." [4] Ships seized in pursuance of these orders were to be released if Norris succeeded in persuading the Swedish ruler to do justice to the English. But the king's action in renewing his orders against English shipping despite "Our friendly instances so oft repeated . . ." left the British "no grounds to expect that he is the least disposed to give satisfaction to our just and reasonable demands; and whereas you were by Our former instructions ordered to make reprisalls upon the ships belonging to the king of Sweden and his subjects unless you found him more favourably inclined to redress the grievances our merchants have already suffer'd and to prevent the like for the future, you are hereby directed to put the sayd orders at present in execution." [5]

As in the private reprisals of the period great care was taken to record seizures accurately and the entire procedure was under the jurisdiction of the Admiralty Court "To the end that such ships that you shall so seize may be proceeded against in the Court of Admiralty, according to the rules and forms of justice . . . ," the Second South-

3. Marsden, *op. cit.*, vol. II, p. 7.

4. J. F. Chance, *British Diplomatic Instructions 1689–1789* (London, 1922), vol. I, Sweden, p. 75.

5. Historical Manuscripts Commission, *Report on the Manuscripts of Lord Polwarth* (London, 1911), vol. I, pp. 40, 41.

ward Fleet was ordered to "carefully preserve all cockquetts, bills of lading, commissions, and all other writings whatsoever that shall be found on board such French ships, and . . . send the same to the said Admiralty court, as alsoe two or three of the principall of every such French ship to be examined in the the same court. . . ." [6]

Writing to the Council of State of the decision, in 1650, to take reprisals against the Portuguese, the Admiralty Judges declared "it is necessary that whatever is in that sort surprized, be by order of the court, or sufficient authority faithfully inventoried, and duely according to the true value apprized. That neither the Portuguese for default thereof have cause to complain, nor to charge it that much was taken, but little put to accompt; nor yet the commonwealth be defrauded of that which in truth ought to come unto them." [7]

A resolution of the States General in 1657 calling for public reprisals against the French ordered "the prizes so taken, to be kept under the protection of the respective colleges of the admiralties to whom the takers do belong, that so notice thereof being given to their H. & M. L. the same may be disposed of by them as their H. & M. L. shall think fit. It is also understood, and herewith strictly forbidden to plunder, damnify, or sell any such prizes so taken; but the takers are to send up the same without any damage. . . ." [8]

Public reprisals, then, resembled private seizures in their procedural outlines, depending for justification upon a claimed offense and a failure of attempts to secure redress and for legality upon a careful accounting of goods seized. In some cases, too, public reprisals performed the function of private reprisals—the seizure of goods in sufficient amount to compensate for goods stolen. Thus in the British reprisals against Portugal of 1650, Portuguese ships were seized by Admiral Blake as compensation for losses caused by

6. Marsden, *op. cit.*, p. 9. For other examples of public reprisals not cited here see the English reprisals against Portugal in 1650, Birch, *op. cit.*, vol. I, p. 164; English reprisals against Spain, *C.S.P. Dom.*, 1655–1656, pp. 2, 3, 40, Marsden, *op. cit.*, vol. II, pp. 23, 4; and English reprisals against the Dutch, *ibid.*, pp. 48, 9.

7. Birch, *op. cit.*, vol. I, p. 164.

8. *Ibid.*, vol. VI, p. 265. The interest of the state in public reprisals through its share in the proceeds (see *infra* p. 57) no doubt tended to strengthen its demands that procedural regulations be faithfully observed. Cf. Jessup and Déak, *op. cit.*, pp. 169, 70.

the privateering activities of the Stuart princes, Rupert and Maurice, from their base in Tagus—activities which, it was charged, the Portuguese government had sanctioned and protected.[9] Similarly, in 1679, the public power of France was used to secure recompense for private individuals, the French ambassador to Spain being instructed to inform the latter court that after vainly seeking justice for certain of his subjects robbed by Majorcan pirates the king of France had decided to resort to more forceful measures and "Ses vaisseaux ont arrêté quelques corsaires maillorquins et continueront à arrêter des vaisseaux d'Espagne jusqu'à ce que l'on fait justice à Madrid à ses sujets.[10] In such reprisals, state power was actually used as a substitute for private power to attain the same ends.

Even when their purpose was principally coercive rulers adopting a policy of public reprisals did not fail to keep in mind the possibility that if reprisals failed as a form of pressure, they might nevertheless result to some degree in a welcome financial satisfaction. Thus the States of Holland, in an attempt to persuade the province of Zealand to join them in reprisals against France, wrote: "the said counter-seizure made at sea will be the chiefest means to facilitate and remove the general arrest made in France; and in case by your expectation France is not to be disposed to take off the said general arrest, it will serve to get in hand as much as is possible, wherewith to satisfy the damages of the good inhabitants of this state, which they suffer by the said arrest in France. . . ." [11]

Public Reprisals in Practice

The chief distinguishing feature of public reprisals, however, is not so much their use of state power—for this was characteristic of the

9. Birch, *op. cit.*, vol. I, pp. 164, 5; Edgar Prestage, *Chapters in Anglo-Portuguese Relations* (Watford, 1935), pp. 140, 141. The reprisals also had a political motive and it was hoped that they would bring about the expulsion of the two princes.

10. *Recueil des Instructions données aux Ambassadeurs et Ministres de France*, vol. II, p. 290; Colbert, *op. cit.*, vol. II, part 2, p. 710. It should be noted that although property was seized in these reprisals, there was increased emphasis on such seizures as a form of coercion rather than as a method of securing direct compensation.

11. Birch, *op. cit.*, vol. VI, p. 268.

earliest form of private reprisals—as it is they authorized unlimited seizures as a sort of punishment of the offending state. In other words, compensation ceased to be the object of reprisals when they became public; retaliatory seizures became instead a sanction, a weapon to enforce a change in the opponent's policy. The public reprisals of the sixteenth and seventeenth century frequently accompanied private reprisals in the "wars of reprisal" discussed above,[12] eventually replacing them in that sphere. Almost always they were ordered in periods of extreme tension immediately preceding wars and were evidently intended as a method of coercing the prospective enemy and perhaps of gaining desired ends without formal resort to war. Then too, reprisals might be employed for the purpose of gaining an advantage over a prospective enemy prior to the outbreak of war, as they were in 1548 when the English fleet received secret orders to seize French ships "saying to them that they have been spoyled before by frenchemenne and could have no justice, or pretending that the victualles or thinges of munition found in any suche frenche shippes weare sent to ayde the Scottes or such lyk." [13]

Reprisals frequently played an important part in attempts to place the onus of the original declaration of war on the enemy or to postpone declared hostilities until alliances could be solidified. Conflict between British and Dutch interests led to reprisals in Africa and the Indies in 1663; [14] in 1664 Dutch ships were stopped in British ports and seizures on the high seas were authorized while the Dutch retaliated in kind [15] but war was not declared until March, 1665, as both powers sought the alliance of the French.[16]

Public reprisals were similarly employed by England for over a year just prior to the Seven Years War. In July, 1755, Boscawen had already attacked a French convoy and Admiral Hawke, with sixteen ships under his command, was ordered to capture French ships of the

12. *Supra*, pp. 48, 49.

13. M. Oppenheim, *A History of the Administration of the Royal Navy and of Merchant Shipping in Relation to the Navy* (London, 1896), pp. 104, 5; *S.P.D. Edw. IV*, vol. IV, p. 39.

14. *Cambridge Medieval History*, vol. V, pp. 179, 80.

15. Marsden, *op. cit.*, vol. II, pp. 48, 9; Richard Fanshaw, *Original Letters of During his Embassies in Spain and Portugal* (London, 1701), pp. 398, 402, 418, 457, 459.

16. K. G. Feiling, *British Foreign Policy 1660–1672* (London, 1930), p. 139.

line and bring them in as securities for redress of the "encroachments" that the British had suffered in the Ohio Valley.[17] In August, after the news of Braddock's defeat had been received, Hawke was authorized to take merchantmen as well, and by the end of the month, similar orders had been given to the entire fleet.[18] As a result, before the New Year, almost three hundred merchant ships worth six million dollars had been captured and six thousand French seamen were in English prisons.[19] The French, meanwhile, protested but took no action, thinking in this way to avert a war for which they were but ill-prepared.[20] The English could expect the support of six thousand Dutch troops but only, the treaty of alliance read, if they were attacked,[21] and an English declaration of war might provide pretext for a Spanish assault.[22] So they were content to wait and continue their depredations. Finally the French declared that a refusal to return the ships seized would be treated as a declaration of war; [23] the king replied that, while anxious for peace, "il ne pouvait consentir à la restitution demandée, parce que les mesures qu'on reprochait au gouvernement anglais avaient été necesitées par les hostilitées commencées par la France en pliene paix"; [24] the French attacked Minorca and war was declared in May, 1756.

The naval campaign of George I against Sweden is the most striking example prior to the nineteenth century of the use of public reprisals as a substitute for war. As Elector of Hanover, George was allied to Prussia and Denmark who, in turn, were at war with Sweden, and he had been promised, for such services as he might render, the cession of Bremen and Vardin to his German realm. As Elector, however, he was a somewhat silent partner in the northern alliance engaging only to prevent Hessian or other German troops from coming to

17. Corbett, *op. cit.*, vol. I, p. 62.

18. *Ibid.*, pp. 70, 72.

19. A. T. Mahan, *The Influence of Sea Power Upon History* (Boston, 1898), p. 285; Pierre Muret, *La Prépondérance Anglaise (1715–1763)* (Paris, 1937), p. 466.

20. .François Joachim de Bernis, *Memoirs and Letters* (Boston, 1902), vol. I, pp. 199 *et seq.*

21. Corbett, *op. cit.*, vol. I, p. 139.

22. Horace Walpole, *Memoirs of the Last Ten Years of the Reign of George II* (London, 1822), vol. I, pp. 389, 90; James Waldegrave, *Memoirs from 1754 to 1758* (London, 1821), p. 28.

23. de Bernis, *op. cit.*, vol. I, p. 222.

24. C. P. V. Pajol, *Les Guerres sous Louis XV* (Paris, 1885), vol. IV, p. 18.

the aid of Charles of Sweden. As King of England George was a neutral, but one whose trade had suffered from the naval activities of the Swedes. In pursuit of his duty to protect British trade, the King of England dispatched Admiral Norris to the Baltic to make reprisals on Swedish ships while fulfilling his Hanoverian treaty obligations by secret instructions to the fleet to intercept reinforcements bound for Sweden by sea.[25]

Reprisals such as these, far removed from the original notion of seizure of property as compensation for property seized, continued to bear the surface characteristics of the old form. The most conspicuous procedural difference lay in the fact that the state, when it commissioned private vessels in addition to employing the public fleet, often received a substantial share of the spoils, a practice heretofore confined to wartime privateering. The license granted to John Hawkyns in 1585 contained the usual statement of losses through the injustice of Spain, the usual injunctions against breaking bulk and falsification. But it also required Hawkyns to "paye . . . in the said courte of Thadmiraltye, to the use of the said Lord Admirall, the full tenthe parte of all suche shippes, goodes, and merchaundizes, as the said master with his shippe, pinnace and companye shall take and apprehende at the seas by vertue of the sayd commission. . . ." [26] During the public reprisals preceding the Second Dutch War, private ships furnished with letters of reprisal against the Dutch were required to give bond of £1000 to pay $\frac{1}{15}$ of their prize to the king and $\frac{1}{10}$ to the Admiralty.[27] This shift to a practice heretofore confined to war when private ships were, in reality, auxiliaries of the fleet, underlines the political nature of the public reprisal.

The Relation Between Public and Private Reprisals

In the sixteenth and seventeenth centuries, public reprisals did not supplant private reprisals which were still employed extensively for the settlement of individual claims. Yet, as has been remarked, private reprisals had all but disappeared by the first quarter of the eighteenth

25. Chance, *British Diplomatic Instructions*, pp. xvii–xxiii; Chance, *George I and the Northern War* (London, 1909), pp. 82–90.

26. Marsden, *op. cit.*, vol. I, p. 244.

27. *C.S.P. Dom. Chas. II*, 1664–1665, p. 182.

century while public reprisals have flourished down to the present time. How great the connection was between the appearance of the one and the disappearance of the other is difficult to determine, particularly in the absence of contemporary comment.

At first glance it seems obvious that the complete substitution of state for private power was the logical outcome of the steadily increasing control of private reprisals by the state which occurred in the sixteenth and seventeenth centuries; that private reprisals disappeared with the growth in strength and inclusiveness of the central government. Professor Clark, in support of this view, declares "it would appear that as the English state approached a condition of governmental organization comparable in inclusiveness to that of the English towns in the thirteenth century, it took away from private persons, as the towns had done more than five centuries earlier, the right to use force on their own account. The factor which determined the extent to which reprisals were to be taken by the state as such, on behalf of its nationals or itself rather than by private persons acting under state authorization, would seem to have been the degree of effectiveness of the control which the state had, rather than anything connected with the principle of reprisals." [28] But the force of this theory is somewhat undermined by the fact that in the fourteenth century reprisals were taken by the "state as such" while otherwise still in a condition of almost feudal weakness. Furthermore there seems no evidence in favor of a theory that the fifteenth-century shift from state to private enforcement can be explained in terms of a diminution of the power of the central government.

The reason for the decline of private reprisals would seem to lie less in the increased ability of the state to press the claims of its citizens against foreign countries successfully than in the reduction of such claims by the more orderly administration that was also a manifestation of the increasing power of the national government. The connection between private and public reprisals may well be to a very considerable extent one of technique rather than principle. Where private reprisals sought by extraordinary measures to do justice to a wronged individual who would otherwise go unsatisfied, the public reprisal was a weapon to punish another state that might else continue to move

28. Clark, *op. cit.*, p. 705.

unchecked along paths claimed to be illegal. The need for private reprisals may have disappeared, to a very large extent, as international trade became less hazardous and the position of a foreigner before the judges of another state less prejudiced. But where the interests of states were concerned, the law still failed to provide an orderly remedy and thus the use of measures of force to secure a claimed right continued unabated.[29]

29. No doubt the increasing expense and difficulty involved in fitting out a ship capable of enforcing letters of reprisal had something to do with the disappearance of this mode of redress. An ordinance in regulation of private reprisals in Cromwell's time declares that no person may set forth a ship to execute letters of reprisal "which shall not be of the burthen of 200 tons at least, and carry 20 guns." *C.S.P. Dom.*, 1651–1652, p. 326. An English order authorizing general reprisals against the French in 1650 states that although according to the law of nations letters of marque and reprisal are grantable ". . . in respect that many of the English soe spoyled are not able to undergoe the charge of setting forth ships of their owne to make seizures by such letters of marque . . ." seizures are to be made by the fleet. Birch, *op. cit.*, vol. I, p. 144.

CHAPTER III

Public Reprisals in the Nineteenth and Twentieth Centuries

THE DISAPPEARANCE of the private reprisal in the eighteenth century appears to have been complete. But the weakness of the law which regulates relations between states has continued to be such that disputes have often arisen which it has been felt possible to resolve only by the use of normally illegal measures for the achievement of what have been claimed to be the legal rights of an aggrieved power.[1] The public reprisals of the nineteenth and twentieth centuries have resembled those of an earlier period and differed from private reprisals in that they have been employed as a method of coercion rather than as an attempt to secure pecuniary satisfaction for a specific loss. The concept of denial of justice, furthermore, has continued to play an important role in providing the aggrieved state with a basis upon which to lay its claim to legal authority for using measures that might otherwise be regarded as contrary to international law in order to check or punish claimed violations of law. But with the development of the practice of enforcing reprisals exclusively by public forces for public ends, there is noticeable an almost complete disappearance of well-understood and uniform regulation of the actual process of enforcement. Modern public reprisals as distinct from private reprisals and, to some extent, from early public reprisals have been carried out by military or naval forces having their own well-developed internal regulations. It is not surprising, therefore, that modern states should

1. As George Grafton Wilson has pointed out "Measures short of war . . . were a particularly common practice in the nineteenth century." A. E. Hindmarsh, *Force in Peace* (Cambridge, 1933), foreword, n.p. This paper, of course, will deal only with acts short of war undertaken as reprisals and not those which constituted intervention.

find it unnecessary to lay down regulations similar to those of the past which sought to prevent the use of reprisal licenses for unauthorized private purposes and were of an essentially book-keeping nature. Moreover, while early public reprisals continued to reflect the notion of a reprisal as a seizure of property, methods of enforcing the modern reprisal have varied sufficiently widely to make less applicable many of the standards of the earlier period. That the modern reprisal differs from its predecessors in a number of ways, however, does not obviate the importance of its regulation. Thus if the precedents of the past were to be followed, one might expect to find the development of an international law which would substitute for the "loss plus costs" yardstick of the past, some standard of proportionality for the reprisals of the present. Little success, however, has rewarded the efforts of jurists to establish standards of procedure for the modern reprisal.

By the middle of the nineteenth century two methods of enforcing public reprisals prevailed, pacific blockade [2] and acts of force on the territory of the offending state. The pacific blockade originated early in the nineteenth century as a method of intervention. It was first applied for retaliatory purposes in 1831 and it was used fairly often for similar purposes thereafter. Regarded with disapproval and as a contradiction in terms by many international lawyers, pacific blockade was, on the whole, similar in methods and aims to wartime blockade, acting sometimes against the ships of the blockaded states only, but more often against the ships of third powers as well. Acts of force short of war employed in retaliation varied widely, ranging from the bloodless occupation of customs houses to large scale destruction of towns by bombardment and fire, and sometimes involving considerable loss of life. Both types of reprisals were, of course, carried out by the public armed forces of the enforcing state.

It is characteristic of peacetime reprisals in the modern period that they have been exclusively a weapon of the larger powers against the smaller and weaker, particularly against those of South America and the Far East. France, Great Britain, and the United States have re-

2. For detailed studies of pacific blockade as such see A. E. Hogan, *Pacific Blockade* (Oxford, 1908), and M. Giraud, "A Memorandum on Pacific Blockade up to the Time of the Foundation of the League of Nations," *League of Nations Official Journal*, 1927, App. II.

sorted to reprisals most frequently but Germany, Holland, and Italy have also employed them on occasion. This is a direct reflection of the difference in aims between public and private reprisals. Since reprisals had ceased to involve a mere seizure of property and had become a measure of coercion, it was obviously no longer possible for a small or weak state to take reprisals against a great. Furthermore, as the type of reprisal which involved the public armed force of the state had as its aim effective coercion without resort to war, employment of such measures as between powers of equal strength was most unlikely. Of all the modern examples studied, only the French occupation of the Ruhr may be described as a reprisal by one great power against another and, actually, so to describe it is to give more weight to Germany's historical position of importance than her strength in 1923 would warrant.[3]

A cursory examination of the list of major public reprisals undertaken in the period in question [4] casts a great deal of light on the nature of modern reprisals. It is evident at once that the states against which reprisals were employed were those which were regarded as being neither wholly respectable nor wholly responsible members of the family of nations—states whose political and financial position was made precarious by recurrent revolution and endemic weakness or states whose location and traditions had in the past isolated them from western progress, particularly in its economic and military aspects. Given to economic and political practices regarded as highly questionable by more mature members of the family of nations, by western

3. American reprisals against France in 1800 (treated in Chapter IV, *infra*), constituted an earlier exception to this rule.

4. Pacific blockades studied include: those of France against Portugal in 1831, against Mexico in 1838, against Formosa in 1884, and against Siam in 1893; those of Great Britain against New Granada in 1837, against Nicaragua in 1842 and 1844, against Greece in 1850, and against Brazil in 1861; and the joint British, German, and Italian blockade of Venezuela in 1902. Acts of force short of war studied include: those of the United States against the Falkland Islands in 1831, against Quallah Battoo in 1832, against Sumatra in 1839, against Greytown in 1854, against China in 1856, against Formosa in 1867 and against Mexico in 1914; those of Great Britain against the Two Sicilies in 1840, against Witu in 1890, against Nicaragua in 1895, and against Egypt in 1924; those of France against Turkey in 1901 and against Germany in 1923; those of Holland against Venezuela in 1908 and Italy against Greece in 1923; and such joint actions as those of France, Britain, and Spain against Mexico in 1861, and the United States, Britain, France, and Holland against Japan in 1864.

standards disorderly or arbitrary in their administration of justice, incapable of imposing by force their right to depart from the standards of Europe, such states have been peculiarly the subject of modern public reprisals.

Acts Giving Rise to Public Reprisals

Denial of Justice and the Modern Reprisal

Almost invariably, the initial act which ultimately gave rise to private reprisals was one of simple robbery. Such robbery, whether on land or on the high seas, when it was allowed to go unpunished by the offender's ruler and when the victim was unable to recover his property, became the occasion for the issuance of letters of reprisal. Property of equal value (plus costs) was seized, a measurable wrong was rectified by a well-understood and uniform procedure, and the matter was closed.

In public reprisals, on the other hand, the causes of action are almost as numerous as the cases themselves. There are some cases in which the original complaint lay against a private individual or group but in most instances the incident leading to reclamations and finally to reprisals was an act of the state itself which the retaliating nation considered to be arbitrary or unjust. In the former case state responsibility arose from the inability of the victim of private action to secure justice; in the latter, state responsibility was created by the wrongful act itself.

The difference between the acts commonly giving rise to private reprisals and those which have constituted the justification for public reprisal has, in turn, somewhat affected the relationship between the existence of a denial of justice and the authorization of reprisals. The "narrow" [5] definition of denial of justice as supported by many modern international lawyers, while more in accord with the concept

5. "Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." Harvard Law School, Research in International Law, *Draft Convention Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners* (Cambridge, Mass., 1929), Article 9, pp. 173–187.

which served as a basis for private reprisals, is difficult to apply to public reprisals. It is only when the "broad" [6] definition of denial of justice is employed that it can be said that the modern reprisal is generally preceded by a denial of justice. The distinction becomes less important, however, when it is admitted, as it is by proponents of both definitions, that acts falling under either involve the state in responsibility for the act complained of.

State acts which have been classified as arbitrary and unjust by retaliating powers vary widely but most of them lend themselves to classification under either the "narrow" or "broad" definition of denial of justice. Acts complained of which clearly fall under the first definition include unjust judgments and interference by the state with the judgments of its own courts. Acts giving rise to public reprisal to which the "broad" definition must be applied include: state actions regarded as illegal in their application to foreigners; state refusal to compensate foreigners for damages incurred during revolutions; state failure to fulfill contractual, treaty or financial obligations. In addition, public reprisals have occasionally been based, in whole or in part, on the claim that an affront has been offered to the honor of the retaliating state. A closer examination of the acts giving rise to public reprisals will show, however, that even within these categories there exists a wide variety of causes of action.

Unjust Judgments and Interference with the Processes of Justice

The French blockade of Portugal in 1831 was the consequence of a series of court decisions against French nationals which France regarded as unjust. French demands included the strict observance in future of the exemption from arrest of nationals of France except by an order from "the Judge Conservator of . . . privileged Nations." [7] British reprisals against Panama were similarly justified on the grounds of an unjust court decision. In this case in 1837 a British consul was attacked on the street. He defended himself with a sword

6. "A denial of justice, in a broad sense, occurs whenever a State, through any department or agency, fails to observe, with respect to an alien, any duty imposed by international law or by treaty with his country." Charles Cheney Hyde, *International Law* (First Edition, 1922), vol. I, p. 491.

7. *British and Foreign State Papers,* vol. 18, p. 367.

cane, wounded his assailant, and was himself severely hurt. He was accused of premeditated assassination and sentenced to six years and costs for carrying concealed weapons. Characterized by the British Government as "cruel and unjust" this action and the failure to rectify it was the cause of a pacific blockade.[8]

The inability of two Englishmen to obtain execution of a court award in their favor because of interference over a period of four years by the Nicaraguan government resulted in the British decision to blockade Nicaragua's coasts in 1844.[9] In 1902, the failure of the Turkish government to comply with the decision of its own court led to the French occupation of Mitylene Island. Satisfaction of one of the claims involved, that of the Lorando family, had been ordered by the commercial tribunal at Constantinople in 1884 but the Government failed to comply. Writing to Delcassé, the French ambassador declared: "Il n'est pas admissible que le gouvernment ottoman, débiteur de nos nationaux, condamné à les payer par les tribunaux qu'il a institués lui-même, refuse d'exécuter les condamnations qui l'ont frappé. Il faut donc, si nous voulons aboutir, recourir aux moyens de contrainte. . . ." [10]

State Actions Regarded as Illegal in their Application to Foreigners

State actions which gave rise to reprisals because they were regarded as illegal in their application to foreigners may be divided into two groups: first, isolated acts of an arbitrary character such as seizure, expulsion, and imprisonment without trial; second, state practices engaged in over a period of time and working hardships on foreigners including compulsory military service and forced loans.

In 1895 a number of British subjects, a consul among them, were expelled from Nicaragua without trial and without being given the opportunity to clear themselves of rather vague charges that they had incited riots against the government. Demanding immediate satisfaction, the British declared that "Her Majesty's Government cannot admit that any adequate or reliable evidence has been produced to justify the arbitrary and violent action taken against the Queen's sub-

8. *Ibid.*, vol. 26, pp. 185–258.
9. Hogan, *op. cit.*, pp. 95–98, p. 162.
10. Ministère des Affaires Étrangères, *Documents Diplomatiques Turquie, 1900–1901* (Paris, 1902), p. 5.

jects." [11] Seven years later, repeated Venezuelan seizures of British ships were among the many subjects of British complaint against that Government and led to her participation in the blockade of Venezuela's coasts.[12] Similar Venezuelan action against Dutch ships brought about Dutch reprisals in 1908.[13]

In 1838 a decree of the Argentine confederation rendered liable to military service all foreigners who had lived in the country for three years or more and who engaged in some trade or business. The French Government, demanding the suspension of this law with regard to its nationals, refused to accept as satisfactory the release of French subjects already conscripted, the Admiral in charge of negotiations declaring "La libération du service de la milice auquel on avait contraint plusieurs de mes compatriotes, et la sortie de prison de Sieur Pierre Lavie sont deux faits avoués par votre Excellence; ils ont existé; par votre ordre ils ont cessé. La conséquence simple et naturelle qu'on en peut tirer, c'est qu'ils peuvent se reproduire. . . ." [14]

Insistence that their subjects receive compensation for damages incurred during revolutionary disturbances led France to reprisals against Mexico in 1838, Britain to reprisals against the same state in 1861, and Germany to participation in the blockade of Venezuela in 1902. When Mexico argued in 1838 that, because of the frequency of revolutionary outbreaks, foreigners could not expect to be compensated for damages incurred in the course of such uprisings, the French characterized these statements as subversive of all order and justice in the international community and encouraging to disturbances within the state.[15]

Disregard of Contractual, Treaty, and Financial Obligations

Disregard for treaty obligations produced British reprisals against the Two Sicilies in 1840 when the latter country granted a monopoly on her sulphur resources. Britain, claiming this act to be a violation of her treaty rights, demanded abolition of the monopoly and an indemnity for damage already done to British interests by its existence. Reprisals

11. *Foreign Relations of the United States*, 1895, vol. II, p. 1028.
12. *British and Foreign State Papers*, vol. 95, p. 1064.
13. Simon Maccoby, "Reprisals as a Measure of Redress Short of War," II *Cambridge Law Journal* (1928), p. 68.
14. *British and Foreign State Papers*, vol. 26, p. 980.
15. *Ibid.*, vol. 27, p. 1178.

were ultimately ordered to enforce this demand and consisted of the seizure of Sicilian ships in the vicinity of Naples and in British ports.[16]

In the early 1860s, the Shogun of Japan, powerless to control the revolting Daimyos who opposed the granting of privileges to foreigners, was unable to fulfill the terms of treaties with Great Britain, France, Holland, and the United States. The memorandum addressed by the representatives of the treaty powers to Japan declared that, far from being fulfilled, their agreements were being violated by the closing of the inland sea, restrictions on commerce, and attacks on foreign ships. They were instructed, they declared, "to maintain Treaty rights intact, and to insist on their complete observance . . ." [17] but, finding the political situation and those instructions to be in irreconcilable contradiction, they were forced to look to other means—the destruction of the armed power of the Daimyo revolt.[18]

Resort to reprisals in case Germany failed to fulfill her obligations with regard to reparations was specifically authorized by Annex II, Part VII of the Treaty of Versailles, Article 18 reading "The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances." [19] French interpretation of this article and of Article 17 resulted in the occupation of the Ruhr Valley by France in 1923.[20] The French note of January 10, 1923, declared that "owing to her default, as verified by the Reparations Commission, in connection with the carrying out of the program for deliveries of wood and coal to France and in accordance with the terms of paragraphs 17 and 18 of Annex 2 of Part VIII of the Treaty of Versailles, the French Government had decided to send into the Ruhr a Controlling Mission com-

16. Charles Calvo, *Le Droit International Théorique et Pratique* (5th edition, Paris, 1896), vol. V, p. 521, 522.

17. *British and Foreign State Papers*, vol. 63, p. 936.

18. *Ibid.*, pp. 870, 873.

19. Quoted in Arnold McNair, "The Legality of the Occupation of the Ruhr," 5 *B.Y.I.L.* (1924), p. 17.

20. The correctness of French interpretation was heatedly discussed, many jurists finding the action inadmissible under the terms of the Treaty. Cf. *infra* p. 123.

posed of Engineers with the necesary powers to superintend the acts of the Kohlen Syndikat, and to ensure, by means of orders given by its President, either to the Syndikat or to the German transport services, the strict enforcement of the program laid down by the Reparations Commission, and further for the purpose of taking all necessary steps to secure payment of the Reparations." [21]

In 1861, Great Britain, France, and Spain were led by Mexican failure to pay debts owing to their nationals to sign a convention "for securing a fulfillment of the obligations of the Republic of Mexico [binding them] to employ on the coast of Mexico a sufficient naval and military force to that end. . . ." [22] In 1902, a German government communication to the Reichstag describing that country's claims against Venezuela declared "of the German claims which were laid before the Venezuelan Claims Commission of 1901 several were dismissed at once, while others were reduced in an evidently arbitrary manner. . . . Moreover, the Government did not even pay the amounts awarded by the Commission, but informed the complainants that reference would be made to Congress. . . ." [23] Other government obligations to private individuals and business enterprises, debts such as that of 7,500,000 bolivares to the German-owned Great Venezuela Railway, were a major basis for joint British, German, and Italian reprisals.

Insults to National Honor

Frequently cited among the causes for reprisals have been acts regarded by the states subjected to them as insulting to their honor. Here the outstanding example is the American occupation of Vera Cruz in 1914 justified by the occupying power as retaliation for Mexico's failure to apologize in the required fashion for the arrest of certain American sailors engaged in the performance of their duties.[24] American honor was also concerned in reprisals against the Barrier forts in 1856 for firing on a ship flying the American flag [25] and in the Greytown case where a mob supported by the local authorities had attempted to

21. Frederick Allemés, "The Legality or Illegality of the Ruhr Occupation," *10 Transactions of the Grotius Society* (1925), p. 61.

22. *British and Foreign State Papers*, vol. 52, p. 377.

23. *Ibid.*, vol. 95, p. 1121.

24. *Foreign Relations of the United States*, 1914, pp. 446–479.

25. Milton Offut, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore, 1928), p. 38.

seize the American minister to Central America.[26] Britain had occasion to demand apology and to take reprisals when none was forthcoming in the case of Brazil's arrest of a British naval officer and crew in 1861 [27] and a similar case involving Greece played its part in the British reprisals of 1850.[28] In most of these cases, however, insults to national honor have not appeared as the sole cause of reprisals but rather have occurred during periods of considerable tension between the countries involved and have formed but one of a number of grounds upon which claims have been made.[29]

Exhaustion of Local Remedies

As was true of private reprisals, in cases involving the interests of private citizens, satisfaction for wrongs which ultimately gave rise to public reprisals was seldom sought through the exhaustion of local remedies, immediate diplomatic interposition by the offended state being generally preferred.[30]

26. *British and Foreign State Papers*, vol. 46, pp. 864–6.

27. *Ibid.*, vol. 54, pp. 150–151.

28. *Ibid.*, vol. 39, p. 523.

29. This is especially true of the American occupation of Vera Cruz. See *infra* pp. 101, 2.

30. It is important to note that a very large number of cases involving claimed wrongs committed by one government against the nationals of another never gave rise to reprisals, the cases instead having been brought before some form of international tribunal. It will be recalled in this connection that methods similar to the modern mixed claims commission procedure were employed in attempts to achieve wholesale settlement of claims that might otherwise have given rise to private reprisals. Cf. *supra* p. 29. The advantages of the arbitral procedure as against reprisals were pointedly demonstrated in the case of the United States and Paraguay Navigation Company (1855–1860) which might well have led to reprisals since the American representative, dispatched to discuss this and other claims, was accompanied by a fairly impressive naval force. Instead, however, it was agreed to refer the case to a joint claims commission which found that the Company had "not proved or established any right to damages . . . against the republic of Paraguay; and that . . . the said government is not responsible to the said company in any damages or pecuniary compensation whatever . . ." In his opinion, accompanying the award, the American Commissioner observed that "It should be a source of gratification to the Government of the United States, as well as its citizens, that Commissioner Bowlin, after having received prompt and full satisfaction for the insult offered the flag of the United States and the injury done to our citizens on board the *Water Witch*, consented to a reference of this pecuniary demand of the United States and Paraguay Navigation Company to arbitration, where justice would be more likely done to the parties, than by an attempt to coerce the payment of such a claim with musket and sword." That

In some cases, such immediate interposition was justified by the state involved on the grounds that the standards of justice of the offending state were such as to make a denial of justice inevitable should local remedies be sought. Britain's blockade of Greece in 1850 was based in part on inability to secure satisfaction for a British subject, David Pacifico, whose home had been looted by mob violence in which soldiers and police were said to have participated. Answering the criticism that British interposition was unjustified since Pacifico had not sought satisfaction of the Greek courts, Palmerston admitted that "if our subjects abroad have complaints against individuals, or against the Government of a foreign country, if the courts of law of that country can afford them redress, then, no doubt, to those courts of justice the British subject ought in the first instance to apply; and it is only on a denial of justice, or upon decisions manifestly unjust, that the British Government should be called upon to interfere." [31]

But, said Palmerston, there may be cases in which tribunals are under the control of a despotic government or are themselves corrupt, and in such cases, "our doctrine is, that, in the first instance, redress should be sought from the law courts of the country; but that in cases where redress cannot be so had . . . to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive." [32] In the case in question, the Foreign Minister declared, it would have been impossible for the claimant to secure justice from the courts. "What satisfaction would it have been to M. Pacifico to have succeeded in a criminal prosecution against the ringleaders of that assault? Would that have restored to him his property? He wanted redress, not revenge. A criminal prosecution was out of the question, to say nothing of the chances, if not the certainty of failure in a country where the tribunals are at the mercy of the advisers of the crown, the judges . . . being often actually removed upon grounds

reprisals may, however, be more popular politically than an arbitration which ends unsuccessfully for the claimant was shown in the public clamor against the award led by President Buchanan himself as well as in subsequent attempts to reopen the claim. John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Washington, 1898), vol. II, pp. 1485–1549.

31. Hansard, *Parliamentary Debates*, 3rd series, vol. 112, p. 382.

32. *Ibid.*, p. 383.

of private interest and personal feeling. Was he to prosecute for damages? His action would have lain against individuals, and not, as in this country, against the hundred. Suppose he had been able to prove that one particular man had carried off one particular thing, or destroyed one particular article of furniture; what redress could he anticipate by a lawsuit, which as his legal advisers told him, it would be vain for him to undertake? M. Pacifico truly said, 'If the man I prosecute is rich, he is sure to be acquitted; if he is poor, he has nothing out of which to afford me compensation if he is condemned.' " [33]

In the case of British reprisals against Brazil in 1868, originating in the looting of a shipwrecked British ship and the murder of the survivors, Brazilian law-enforcing authorities themselves seemed ready to admit their inability to secure justice for the claimants. Initially British representatives sought to induce the authorities to arrest the criminals. But the Brazilian officials were noticeably laggard and, after some time had elapsed, one of them described the situation as follows: "it is my duty to declare to you that all the investigations to know who had been the robbers of those goods having been unfruitful, and one on whom rested suspicion having succeeded in escaping to the Oriental State, and another . . . who was met with having articles of those goods saved, and who immediately fled without it being possible to succeed in taking him, I instituted the process against one only, Mariano Pinto . . . , who also was found with articles in his house. The difficulty of making the witnesses residing on the coast of Albardao to come to this city . . . the repugnance which those residents have to appear before judicial authority; the fear of being reckoned as accomplices in that robbery of the goods saved from the barque; the want of resources forcibly to make them come to give evidence,—all this delayed Mariano Pinto's process to this day . . . and on this occasion it is my duty to declare to you that I have used every diligence to know of some other persons who may have robbed the cargo of the English barque, but all was unsuccessful, it resulting thence that the real robbers will remain perhaps unpunished, without justice having means to discover and process them." [34]

33. *Ibid.*, p. 961.
34. *British and Foreign State Papers*, vol. 54, p. 604.

The impossibility of instituting court proceedings being thus demonstrated the British instead demanded reparation and finally resorted to pacific blockade.

Diplomatic Negotiations

Like both the private and public reprisals of the sixteenth and seventeenth centuries, the modern public reprisal has generally been preceded by fairly extensive negotiations carried on either by the regular representatives of the offended state or by special envoys. Exceptional were those semi-civilized areas where no diplomatic representation was maintained and where the naval officer who undertook reprisals was also instructed to make the demands which preceded them. In 1831, for example, Commodore Downs was ordered to Quallah Battoo in Sumatra by the Secretary of the Navy to investigate reports that an American ship had been looted. Should these reports prove to be correct and if the Americans had given no provocation, the Commodore was to demand restitution of the stolen property and punishment of the guilty and was to resort to force if his demands proved unsuccessful.[35]

In several cases negotiations were carried on by the consuls of the offended powers. Both Portugal [36] and Argentina [37] objected to the French employment of this practice, complaining that it was inconsistent with their dignity to discuss vital matters with consular officers, officers, moreover, who were without special authorization to deal with the points in question. Such complaints, however, had no effect on practice and the Powers continued to negotiate through consuls, ministers, special envoys or naval officers as suited their convenience.

Regulation of Procedure

Authorization of Reprisals

In the medieval and early modern periods, considerable emphasis was placed upon the fact that reprisals could be authorized by the sov-

35. Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the U.S.* (Baltimore, 1928), pp. 22, 23; J. Reuben Clark, *Right to Protect Citizens by Landing Forces* (Washington, 1929), p. 51.

36. *British and Foreign State Papers*, vol. 18, p. 367.

37. *Ibid.*, vol. 26, p. 956.

ereign power only. In the nineteenth and twentieth centuries, in contrast, the decision that further discussions are fruitless and that the only hope for satisfaction lies in force although it may be made by the retaliating government itself, may also rest with the negotiating agent or with the naval officer sent to support him. Similarly the measures to be taken may be decided upon by the home government or by its representatives, civil or military, abroad.

Although at first glance this innovation in practice might seem to represent a decline in standards, it is clear that the modern envoy or naval officer acts as an agent of the sovereign power and in its name. That less emphasis has been placed on this fact in the modern period is, no doubt, due to the disappearance of the need for protecting the national state against smaller sovereignties or semi-sovereignties within itself that might seek either to break away or else to involve the state in responsibility for their arbitrary actions.

Naval officers sent to the support of regular or special envoys have thus frequently been allowed considerable latitude. In the Greytown case, for example, the instances of the American agent Fabens, having proved ineffectual, a naval vessel was sent to support him. Commodore Hollins, in command, had no specific orders as to what measures were permissible although it was, of course, understood that force might be necessary. His instructions expressed the hope that the incident could be settled peacefully: "it is very desirable that these people should be taught that the United States will not tolerate these outrages, and that they have the power and the determination to check them. It is, however, very much to be hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life. . . ." [38] Those hopes were not satisfied and Hollins ordered the bombardment and complete destruction of the town,[39] his action being subsequently approved by the government.

Before the British pacific blockade of New Granada in 1837, Admiral Sir Peter Halkett was given general instructions "to co-operate with His Majesty's Mission in New Granada in any way that may be deemed most advisable to enforce the just demands of His Majesty's Government." [40] More specific instructions were given to co-operating civilian and naval officers in the Brazilian reprisals of 1862 but they

38. *Ibid.*, vol. 46, p. 875.

39. *Ibid.*, vol. 46, p. 880.

had, nevertheless, a fairly wide area of choice. Christie, the British Consul in Brazil, was instructed that "In case the Brazilian Government refuse to comply with the demands of Her Majesty's Government . . . and if it should be determined that further negotiation is useless, it has been determined to enforce these demands by reprisal against Brazil. In this event you will consult with Admiral Warren as to the means of carrying out the objects that Her Majesty's Government have in view." [41] Later Christie was advised that "These reprisals might be in the shape of the seizure of some ship, or of some portion of the public property belonging to Brazil, to be held as security until the Brazilian Government did justice in the respective cases, and then restored to them uninjured. But as such a course might lead to collision between the two Governments, it may be preferable that the property seized should be private property." [42] The final decision on this point was left to the discretion of Admiral Warren who, in order to avoid collisions with the Brazilian authorities chose "to send out two steamers to intercept Brazilian vessels out of sight of land . . ." rather than to make any seizures in the port of Rio.[43]

In the joint British, French, American and Dutch reprisals against Japan in 1864, naval officers were strictly limited by their instructions to opening the Straits of Shimonoseki, "destroying and disarming the batteries of the Prince of Chosiu, and otherwise crippling him in all his means of attack. . . ." They were to avoid any demonstration of force in the vicinity of Osaka and under no circumstances were they to enter into any negotiations with the Prince.[44] Similarly explicit instructions were given to the French forces sent against Turkey in 1901 which were ordered to seize the customs house at Mitylene, to administer it, and retain the revenue until the Sultan had given the desired satisfaction.[45]

In 1924, after the assassination in Egypt of Sir Lee Stack, Lord Allenby, the High Commissioner, in carrying on his negotiations with the Egyptian authorities, was far from adhering to the letter of his instructions and ordered the seizure of the Alexandria tobacco customs

41. *Ibid.*, vol. 54, p. 717.
42. *Ibid.*, vol. 54, p. 718.
43. *Ibid.*, vol. 54, p. 742.
44. *Ibid.*, vol. 63, pp. 870, 871.
45. Ministère des Affaires Étrangères, *Documents Diplomatiques Turquie, 1900–1901* (Paris, 1902), p. 44.

as a reprisal without awaiting British government authorization of this measure.[46]

Methods of Enforcement

As has been said, pacific blockade in the methods employed closely resembled its wartime counterpart. Blockades were generally notified and in addition approaching ships were given individual warning of the blockade's existence. Notifications occasionally mentioned that the blockade was the consequence of the victim's failure to do justice. In the dispute between France and Argentina in 1838 it was said that a blockade was declared after the French consul at Buenos Aires had followed "sans succès les voies de la négociation, pour obtenir réparation des graves infractions du droit des gens. . . ." [47] The British notification of the blockade of Venezuela in 1902 referred to Venezuela's failure "to comply with the demands of His Majesty's Government." [48] Although the question of effectiveness was never raised in a case of pacific blockade, notifications themselves sometimes characterized the blockades to be applied as an "état de blocus effectif." [49] On the whole, the chief difference between warlike and pacific blockade lay in the fact that when blockades of the latter type were raised, the ships of the blockaded states, seized during operations, were released.[50]

Since the conduct of ships engaged in blockade operations was regulated by the prize rules of the enforcing state, there was no need for such detailed individual instructions, regarding preservation of documents, disposal of goods, and other procedure, as were issued to the private ships engaged in reprisals of the earlier type. Occasionally, however, as in the British blockade of Brazil in 1862, detailed regulations for the treatment of captured ships were issued. In this case Commander Henry was instructed that "All passengers you may find in such ships are to be treated with every consideration and are to be allowed to retain every article of personal property, the ships and their freight only

46. A. P. Wavell, *Allenby in Egypt* (London, 1943), p. 115; G. A. Lloyd, *Egypt Since Cromer* (London, 1933), vol. II, p. 101.
47. *British and Foreign State Papers*, vol. 26, p. 727.
48. *Ibid.*, vol. 95, p. 425.
49. French blockade notification, Siam, 1893, *ibid.*, vol. 87, p. 352.
50. For treatment of neutral ships see *infra* pp. 87–92.

being detained, with the masters and such number of the crew as may be necessary to keep them clean and to look after the cargo. All injury or damage to the hulls or sails of the ships detained must be most carefully avoided. . . ." [51] For the most part, however, instructions were concerned only with notification, the amount of time to be given neutrals to leave port, and whatever exemptions were to be made.

While pacific blockades followed, with slight exceptions, a single pattern, acts of force short of war, as the expression indicates, might take one or more of a great variety of forms. Such acts ranged from the occupation of ports and customs houses in more or less peaceful fashion to acts of destruction involving ships, forts, or entire towns with loss of life on both sides not uncommon. An attempt to classify these acts would be as unrevealing as it would be futile. Unregulated by law, municipal or international, accepted with little complaint by the neutrals of the international community, they have had in common only the fact that they have been intended as reprisals rather than as war and have been acquiesced in as such by the states against which they have been directed.

Proportionality

In 1928 a mixed arbitral commission considering German reprisals against Portugal during the World War (The *Naulilaa* Case) stated it as a principle of law that reprisals should be proportionate to the offense which produced them. "Even if one admits that international law does not require that reprisals be measured approximately by the offense, one must certainly consider as excessive, and consequently illicit, reprisals out of all proportion to the act which motivated them." [52] This view, although reflecting the opinions of international lawyers, has little to support it in the practice of states.

It must be said that on many occasions public reprisals have not violated the standard of proportionality but, as frequently, measures have gone unchallenged that obviously fell into the category considered illegal in the *Naulilaa* case. Thus in 1856, in retaliation for the firing of the Chinese Barrier forts on an unarmed naval vessel—firing from which no loss of life occurred—an American force seized and

51. *British and Foreign State Papers*, vol. 54, p. 803.

52. The *Naulilaa* cited in Herbert Briggs, *The Law of Nations: Cases, Documents, and Notes* (New York, 1938), p. 679.

razed four forts mounting 176 cannon. It was estimated that four hundred Chinese were killed and many more wounded.[53] In 1890 the refusal of the Sultan of Witu to give up the criminals responsible for the death of several German subjects provoked a British expedition in which a town was destroyed and seventy or eighty natives lost their lives.[54] Five years later Nicaragua expelled a number of British subjects, accused of participating in political riots, without allowing them any sort of trial. After several months of fruitless negotiations the British occupied Corinto to enforce their demands which included not only payment of compensation to the expelled Englishmen but also an indemnity of £15,000.[55] In 1914 eight American sailors, engaged in loading kerosene on a whaleboat flying the American colors, were arrested by a Mexican squad and marched through the streets of Tampico for about five minutes. They were then met by an officer of higher rank who ordered that they be returned to their boat. The boat was not permitted to leave for almost an hour until an apology from the commanding military officer in Tampico had arrived. The officer responsible for the incident was placed under arrest but the Mexican Government refused to comply with the demand that they hoist the American flag in a prominent position and salute it with twenty-one guns. In retaliation United States forces occupied the city of Vera Cruz, bombarding the southern section.[56]

Should international regulation of reprisals be attempted, a standard for proportionality would not be easy to establish. Private reprisals were by their very nature limited to loss plus cost but public reprisals have rarely had as their final object the actual seizure of sufficient property to compensate injured subjects for their losses. Rather they have been intended as measures of coercion to remain in force until the attainment of some satisfactory arrangement. Conversely, they might be made increasingly severe should the offending state prove intractable. Describing reprisals already taken against Greece in 1850 (the seizure of the rather insignificant fleet) as insufficient to bring

53. Offutt, *op. cit.*, pp. 38, 39.

54. *British and Foreign State Papers*, vol. 82, pp. 351–8. This action was taken by the British rather than the Germans because the latter claimed that the transfer of Witu from German to British protection had been concluded. The British denied this but expressed their willingness to co-operate.

55. *Foreign Relations of the United States*, 1895, vol. II, pp. 1025–1034.

56. *Ibid.*, 1914, pp. 446–479. Cf. *infra*, p. 101.

that country to terms, Wyke, the British minister at Athens, declared that it was essential to go further, to continue to seize property, if necessary, "until such time as the sum demanded for compensation for wrongs and losses shall be liquidated. . . ." [57] But in reality such seizures were intended to serve as security for payment rather than as a form of payment in themselves, as appears in Palmerston's letter to Wyke on the eve of negotiations. "Of course those vessels belonging to the Greek Government and to Greek subjects, which have been detained . . . as reprisals, will be detained not only during the negotiations . . . but also afterwards, until full satisfaction has been actually given by the Greek Government, as no dependence could be placed upon mere promises made by that Government, if no sufficient pledges were kept in hand for the faithful execution of such promises; and there would be great risk if promises alone were trusted to, that these promises would be broken, and that a necessity for active measures would again recur." [58]

Since public reprisals were intended to coerce, rather than to be themselves the source of compensation, seizure of property, or its destruction, was not limited by the amount of loss plus damages. The hardships of unlimited seizure, however, were mitigated by the fact that property was generally sequestered rather than confiscated and, therefore, was returned when the offending state yielded. Treaties and agreements closing a state of pacific blockade generally provided not only for the release of ships seized but also for the immunity of the blockading power from any claims for damages. Upon the conclusion of her pacific blockade of Portugal in 1831, France returned seized merchant ships to their owners. She refused, however, to restore the Portuguese battleships taken after French naval forces, advancing up the Tagus, had been fired upon from forts on shore since, it was contended, the Portuguese by firing upon the French ships had created a *de facto* state of war. Portugal's vigorous protests met with no success, Great Britain responding to her appeals for aid with unqualified support of the French position.[59]

In most cases where retaliatory actions proceeded to the length of wholesale destruction of lives and property, it was felt by the retaliat-

57. *British and Foreign State Papers*, vol. 39, p. 508.
58. *Ibid.*, vol. 39, p. 577.
59. *Ibid.*, vol. 18, pp. 414–431.

ing state that neither negotiation nor the use of force less severe would bring about compensation and that the best that could be hoped for was that prompt retaliation for unlawful acts would, at least, prevent their recurrence. In 1856, in the Barrier Forts incident mentioned above, several shots were fired by Chinese forts on an unarmed American naval vessel. The resulting retaliatory action cost the lives of four hundred Chinese and seven Americans. Although no reparation was made for the original injury the Secretary of the Navy, complimenting the commanding officer on his decisive action, described it as having "caused the flag of the United States to be respected by the Chinese, contributed largely to the security of our citizens in China, and, during the troubles which followed, . . . probably been the means of saving many lives and much property." [60]

In the Greytown case Commodore Hollins, after vainly seeking compensation from the inhabitants, announced that he intended to bombard the town "to the end that the rights of our country and citizens may be vindicated, and as a guarantee for future protection." [61] The town was completely destroyed. Defending this act, criticized by many as being of a severity out of all proportion to the violence against American business interests that had provoked it, President Pierce declared: "Whatever it [Greytown] might be in other respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordinance, small arms, and ammunition, and might easily seize on the unarmed boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to whom the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an organized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages

60. Offutt, *op. cit.*, p. 39.
61. *British and Foreign State Papers*, vol. 46, p. 880.

depredating on emigrant trains or caravans and the frontier settlements of civilized states. . . ." [62]

In cases such as these, the severity of the reprisal was proportioned not to the extent of the damage already done but to the extent of the damage that might be anticipated in the future, should the consequences of illegal action not be sufficiently disastrous to deter repetition.[63]

International Regulation and the League Covenant

Before the first World War, there was only one international convention that might be said to limit in any way the issurance of reprisals. This was the Convention adopted at the Hague Conference of 1907 limiting the employment of force in the recovery of contract debts. It read:

> "The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as due to its nationals.
>
> "This undertaking, is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or after

62. John Bassett Moore, *A Digest of International Law* (Washington, D.C., 1906), vol. VII, p. 115. A similar attitude to that expressed here underlay American destruction of native settlements in areas that could neither be called civilized states in their own right nor the possessions of civilized states. Cf. Falkland Islands, 1831, discussed in Offutt, *op. cit.*, p. 21; Quallah Battoo, Sumatra, 1832, *ibid.*, pp. 22, 23; Muckie, Sumatra, 1839, *ibid.*, pp. 24, 5; Drummond Island, 1841, *ibid.*, p. 26; Sumatra, 1841, J. Reuben Clark, *op. cit.*, p. 52; Fiji Islands, 1840, 1855, 1858, Offutt, *op. cit.*, pp. 25, 35, 40, Clark, *op. cit.*, pp. 52, 55, 56. See also the British destruction of Witu in 1890, *British and Foreign State Papers*, vol. 82, pp. 351–358.

63. The tendency of states in making claims for compensation to exaggerate the damages done to them has been described and documented by Philip C. Jessup in "The United States and Treaties for the Avoidance of War," *International Conciliation*, Document 239 (April, 1928), pp. 190–193. The author points out that when such claims are submitted to an international tribunal, they are generally scaled down considerably. With regard to reprisals this point is illustrated by the *Naulilaa* case, cited *supra* p. 76, in which German forces attacked and destroyed a fort and four posts in the Portuguese colony of Angola in reprisal for the killing of three German officials and the internment of two others in the Portuguese post of Naulilaa. The tribunal found "a lack . . . of an admissible proportion between the alleged offense and the reprisals resorted to. . . ." Briggs, *op. cit.*, p. 679.

accepting the offer, prevents any compromise from being agreed on, or after arbitration, fails to submit to the award." [64]

This Convention, restricted as it was to a qualified prohibition, set up no standards of allowable action should the case fall within the conditions of the second paragraph. Thus, at the beginning of the twentieth century, international regulation had gone no further than to state that in one specific class of wrong no action was allowable until an effort had been made to arbitrate.

The Covenant of the League was silent on reprisals and only a test case could show what relevance, if any, Articles 10 to 16 had to acts of force short of war embarked upon in the name of retaliation. This case arose with the Italian bombardment and occupation of the Greek island of Corfu in 1923.

On August 27, 1923, the Italian member of the Commission to delimit the southern frontier of Albania and his aides were murdered in Greece, a short distance from the Graeco-Albanian frontier. There was no clue as to the identity of the assassins. In its statement to the League, however, Greece declared, "The moment it learned of this regrettable event the Greek Government took energetic steps to discover the author of the crime, and spontaneously expressed to the Italian Government the profound regrets of the whole country." [65]

On August 29 the Italian Government made known its demands. They included an official apology to be offered at the Italian legation in Athens, a memorial service at which all members of the Greek Government were to be present, a salute to the Italian flag by the Greek fleet, an inquiry at the place of the murder in the presence of the Italian military attaché, an indemnity of fifty million lire to be paid within five days, and payment of military honors to the bodies of the victims. The next day, the demands regarding the apology, memorial service, and military honors were accepted without reservation by the Greeks who also offered a salute to the Italian flag before the legation in Athens. The other demands, however, they were unable to accept, regarding them as an infringement of the sovereignty and injury to the honor of Greece. Nevertheless, the Government expressed itself as

64. James Brown Scott, *The Hague Peace Conferences of 1899 and 1907* (Baltimore, 1909), vol. II, p. 357.

65. League of Nations, *Official Journal*, 1923, p. 1413.

willing "to grant fair and equitable compensation to the families of the victims, and to accept the assistance of Colonel Perrone, who may be able to contribute to the judicial enquiry by furnishing information which will assist in tracking the authors of the crime." [66] Should these terms be unsatisfactory, Greece was willing to accept the decision of the League.

On August 31 an Italian squadron appeared in Corfu harbor. When the commander's demand for surrender was not immediately complied with, the fortress—which was being used at the time to house Greek and Armenian refugees from Anatolia—was bombarded. Fifteen were killed and many more wounded. The island was then subjected to military occupation as were several other small Greek islands.[67] On September 1, Greece appealed to the Council under Articles 12 and 15.

The Greek suggestion that the matter should be dealt with by the League was, however, unacceptable to the Italian Government. In the background, therefore, Mussolini played politics. The murdered Italian, it was claimed, was an agent of the Ambassadors' Conference since it was to that body sitting in Paris and composed of a French representative and the Ambassadors to France of Great Britain, Italy, and Japan that responsibility for the execution of the peace treaties had been delegated with the dissolution of the Council of Five in January, 1920. Mussolini thus made it known that should the case be left to the Conference where Italy could sit in judgment upon a Greek crime against one who was at once a servant of the Conference and a representative of Italy, he would eventually evacuate the island. But if the League took jurisdiction, he implied, Italy might occupy the island indefinitely.[68]

Meanwhile, in the foreground, Salandra, Italy's representative at the League, advanced legal arguments pointing out to the Council that there could be no threat of war involved as Italy did not intend war. Greece had described the occupation of Corfu as a hostile act that might lead to a rupture dangerous to world peace. "Italy, however, has solemnly declared that this occupation has no hostile character—that it was merely designed to secure obligations arising out of responsibil-

66. *Ibid.*, p. 1414.
67. Arnold J. Toynbee, *Survey of International Affairs, 1920–1923* (London, 1925), p. 349.
68. *Ibid.*, p. 350.

ity for a terrible crime. There is no danger of war. There is not even a suspension of diplomatic relations. Where can a sufficient reason be found for the application of Articles 12 and 15 of the Covenant which are founded on the supposition of a danger of war." The League in accepting jurisdiction of this case, Salandra declared, would be overstepping the bounds of its authority. "The creation of the League of Nations does not constitute a renunciation by States of all right to act for the defence and safety of their rights and of their dignity. If this were so, no State would desire to belong to the League. The authority of the organs of public international law . . . must be maintained and respected; but the first condition is that the organ itself should recognize and observe the limits of its authority." It was not reprisals that threatened peace, he argued, but the attempt on the part of offending states to escape punishment for their crimes. "The peace of the world is not troubled or threatened by the act of guarantee accomplished by Italy. It would be more likely to be threatened if responsible States were able to assume that there was a means of escaping the consequences of their own misdeeds by complaining of sanctions and endeavoring to ensure that the causes which rendered these sanctions necessary should be forgotten." [69]

Italy prevailed; the case was settled by the Conference of Ambassadors; and Greece was required to pay to Italy an indemnity of fifty million lire.[70] The League could not remain completely silent on the question, however, and some elucidation of the Covenant was clearly called for. On September 22, Lord Cecil proposed that a series of questions raised by the incident be submitted to a commission of jurists, among them "The existence and nature of the right of one State to enforce demands made upon another State by measures of coercion, such as the occupation of territory or the like, and how far, if at all, the Covenant has modified any such rights as between Members of the League." [71]

The wording of the question brought immediate objections from Salandra who rightly interpreted it as an attempt to get a legal opinion on the correctness of such action as Italy's. "As at present drafted this point amounts to asking the following question. Was Italy right or

69. League of Nations, *Official Journal*, 1923, p. 1288.
70. *Ibid.*, pp. 1305, 1306. 71. *Ibid.*, p. 1320.

wrong in occupying Corfu? Whether Italy was right or wrong, the incident is closed, and I cannot admit that anybody should be allowed judgment in the matter. . . ." Notwithstanding these objections, Italy did not intend to be uncompromising and would find acceptable a restatement of the question in more general terms. "If the question be put in a quite general way—for instance, if it be asked what are the rules of the old international law which have been abrogated or renewed by the Covenant—I shall not oppose the discussion of such a question, for reprisals do not merely include the occupation of territory, but may also comprise the interruption of commerce or a commercial blockade; but if the question is to be regarded solely from the point of view of the occupation of territory, I may say at once that I shall oppose any discussion." [72]

The question, as finally drafted, Question IV of those submitted, represented a substantial concession to Italian susceptibilities. It read "Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?" The Jurists' answer could not have been more sparing of Italian feelings had it been drafted by the representative of that Government himself. "Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures." [73] As Professor de Visscher, himself a member of the Commission of Jurists, remarked of the answer to Question IV, "on a fait observer, non sans raison, que si elle suggère le principe d'une distinction, elle omet totalement d'en indiquer le fondement et ainsi de préciser les mesures qui doivent être tenues pour inconciliables avec les obligations du Pacte." [74]

72. *Ibid.*, p. 1321.
73. *Ibid.*, 1924, p. 524.
74. Charles de Visscher, "L'Interpretation du Pacte au Lendemain du Différend Italo-Grec," 51 *Rev. Droit Int.* (1924), p. 387.

In the discussion among lawyers that followed the incident Professor de Visscher himself attempted to supply the distinction found wanting in the Jurists' answer. Discarding completely the implication of the Italian position—that reprisals were to be judged according to the intentions, peaceful or warlike, of the retaliating states—de Visscher based his distinction on the difference in effect between armed reprisals and those of a purely economic character. Armed reprisals, he said, had derived their justification in the past from the unlimited right of an independent state to resort to war. But "Le Pacte, en retirant aux États Membres de la Société le droit de faire la guerre avant recours aux procédures établies par les articles 12 et suivants, enlève aux représailles armées cette dernière justification." [75] Economic reprisals such as the refusal to carry out treaty provisions or to admit to one's ports the ships of an offending state were not necessarily based on the ability of a strong state to overpower a weak nor were they likely to lead to a rupture. Hence they might be regarded as legitimate under the Pact. "Pourtant, on ne peut dire que, per se, de telles mesures ont pour conséquence normale de provoquer une rupture entre les parties, même lorsque celles-ci sont de puissance sensiblement égale. Le défaut de réaction violente de la part de l'État qui les subit peut-être le résultat d'une décision parfaitement libre et non pas seulement une consequence de sa faiblesse. Des commentateurs autorisés du Pacte admettent la légitimaté des représailles de cette nature avant toute tentative de réglement pacifique." [76]

Assimilation of armed reprisals to the Covenant provisions on war, as supported by de Visscher and Politis was opposed by others as an unwarranted extension of the meaning of those provisions. Said Professor Strupp, "Ni l'article 12, ni l'article 15 ne contiennent réellement une interdiction des représailles; ils se prononcent uniquement contre la guerre. . . . M. Politis a professé une autre opinion. Partant de l'idée, à notre avis inexacte, que certaines représailles s'identifient avec la guerre (ce qui n'est pas une conception juridique) il arrive logiquement, au regard des dispositions des articles 12 et 15, à nier la possibilité de représailles. Et s'il confond le droit de représailles existant per se avec le droit de la necessité, il oublie que le premier est abstrait en ce sens qu'il peut s'exercer du moment qu'un délit inter-

75. *Ibid.*, p. 382.

76. *Ibid.*, p. 386.

national à été commis, sans qu'il soit nécessaire de poser la question de subsidiarité du moyen employé comme représaille." [77]

Both sides of the argument, however, drew comfort from the fact that whether or not reprisals were assimilable to war, they were "likely to lead to a rupture" and could, therefore, be dealt with in that sense by the League. As Strupp put it, "Si nous sommes parvenu à démontrer que le Pacte de la Société des Nations n'a pas défendu les représailles, il convient toutefois de proclamer encore une fois que celles-ci peuvent, de par leur nature, constituer dans un cas donne (et le cas de l'occupation de Corfou est à cet égard vraiment typique) un incident qui pourrait amener une rupture. La conséquence en est non la défense des représailles, mais la possibilité pour l'État contre lequel sont dirigées les représailles d'invoquer, aux termes des articles 12 et 15 du Pacte, le secours du Conseil de la Société des Nations." [78]

Answer IV seems, on the whole, to have begged the question rather completely. The Council could deal with the dispute because it was one likely to lead to a rupture—but members of the League did not need a Commission of Jurists to inform them of what had already been agreed upon in Article 12, "that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to judicial settlement or to enquiry by the Council." Since, according to Answer IV, the Council was to act "when the dispute has been submitted to it" it is difficult to see that, in this respect, the Jurists had in any way clarified the situation. Having taken jurisdiction of the dispute, was the Council to recommend a settlement of the whole affair or merely to recommend the maintenance or withdrawal of reprisals and then start afresh? Should the Council decide that the reprisals in question were likely to lead to war, was it to recommend withdrawal whatever their justification? Should it decide that the reprisals were not likely to lead to a rupture was it therefore to conclude that they were outside the jurisdiction of the League and might continue, or were its members to assume that once the dispute was submitted to the Council they were to attempt to settle it in order to bring about an end to the reprisals altogether?

All these questions might have been raised in another Corfu case

77. Karl Strupp, "L'Incident de Janina Entre la Grèce et L'Italie" 31 *Rev. Gen.* (1924), p. 255.

78. *Idem.*

and it is difficult to see what guidance the Council would have found in the Jurists' statement. The test never came, of course,[79] but the Corfu incident and the discussion which it provoked showed unmistakeably that the weakness of the Covenant with regard to retaliation lay in not referring to it at all, thus giving rise to the possibility of endless quibbling over jurisdiction by any state which desired to employ reprisals unchecked.

Third Powers

In the enforcement of private reprisals, the interests of third states could become involved only as a result of illegality and, as has been seen, licenses were emphatic in their injunctions against the seizure of goods of friendly powers.[80] In the case of public reprisals, on the other hand, state-authorized interference with the interests of third powers has been common, and has generally been accepted by such powers.

The reason for this shift lies partly in the nature of the weapon. The goods and ships of subjects of an offending state might easily be seized either in port or on the high seas without in any way involving encounters with neutral states. So too when modern reprisals have consisted in the seizure of ships, unresisted occupation of territory, or the taking over of customs houses, infringements on the rights of other states have not been difficult to avoid. But the weapon of blockade is fully effective only when *no* ships may enter or leave the affected ports, while such acts of force as the bombardment and destruction of towns may be impossible of achievement if care must be taken to destroy only the property of nationals of the offending state.

International lawyers have regarded with suspicion a system in which states assumed the privileges of belligerency with respect to third powers while accepting none of its obligations. Acting on this

79. Although a resolution of the Egyptian Parliament called upon the League of Nations to intervene in the Lee Stack case, the measures adopted by Britain in this case were regarded by jurists as being of a constitutional rather than an international nature in consequence of the reservations made by the British government when it withdrew its protectorate over Egypt. Cf. Charles de Visscher "Le Conflit Anglo-Égyptien et la Société des Nations," 51 *Rev. Droit Int.* (1924) nos. 4 and 5.

80. *Supra* pp. 34, 35.

philosophy, the Institute of International Law resolved in 1887 that pacific blockade was permissible under the law of nations but could not apply to the ships of neutral powers.[81] This resolution was of no practical effect.

On the rare occasions when modern reprisals have been enforced as were those of the past by the seizure of ships of the offending state, third powers have enjoyed immunity from their effects. In the British seizure of Brazilian ships in 1861, the officer commanding was given strict instructions "to ascertain that the ships seized are the property of Brazilian subjects." [82] Similarly limiting their seizures, in 1908 Dutch men of war captured the entire Venezuelan navy in reprisal for the seizure of Dutch vessels.[83] But these cases are the exception and, in the more common form of modern reprisal, the pacific blockade, some form of interference with third powers has been the rule.[84]

The mildest form of interference was that which occurred in the British blockade of New Granada in 1837 when neutral ships, stopped during the blockade, were allowed to proceed as soon as the blockade was lifted.[85] More representative of the policy toward neutral shipping, however, was the French order "Il sera procédé contre tout bâtiment qui tenterait de violer le dit blocus conformément aux lois internationales et aux Traités en vigeur" [86] or its British counterpart "any . . . ship or vessel that may attempt to break the blockade, will be seized and be dealt with according to the rules established for the breach of a *de facto* blockade." [87]

In the enforcement of the blockade, neutral ships already in port were given a certain length of time to leave and individual notifications of the existence of the blockade were generally required before approaching ships could be seized. The instructions issued to British naval officers during the blockade of Venezuela in 1902 are, on the

81. Hyde, *op. cit.* (second ed.), vol. II, p. 167*n*.

82. *British and Foreign State Papers*, vol. 54, p. 803.

83. *Foreign Relations of the United States*, 1909, pp. 630–635; Maccoby, *loc. cit.*, p. 68.

84. The exceptions are the French blockade of Portugal in 1831 and the British blockade of Greece in 1850 in which neutral vessels were not affected.

85. *British and Foreign State Papers*, vol. 26, pp. 257–9, 265.

86. In the blockade of Formosa in 1884, *ibid.*, vol. 75, p. 494.

87. In the blockade of Nicaragua in 1842, *ibid.*, vol. 34, p. 1263.

whole, representative of the policy of blockading powers toward neutral ships. Such officers were instructed as follows:

> 1. Every merchant vessel sailing under other than Venezuelan flag found in the immediate neighborhood of the blockaded area to receive specific notification as follows:
> 2. to be boarded by an officer, to be notified of the existence and extent of the blockade; master to be informed "that he cannot be permitted to communicate with the blockaded port, and that any attempt to do so in defiance of such warning will render his vessel liable to seizure and detention for trial in a Prize Court, with probable ultimate confiscation of ship and cargo."
> 3. boarding officer to make entry in log book, etc.,
> 4. ships which on being boarded produce obviously false papers or refuse or fail to produce the necessary documents to prove nationality, identity, and destination to be ordered to quit the neighborhood under penalty of seizure and ultimate confiscation.[88]

Following a similar procedure, France confiscated forty-six neutral vessels for breaking the Mexican blockade in 1838, at the same time in her blockade of Argentina condemning twenty-seven Montevidean vessels as well as numerous ships under the flags of England and Brazil.[89]

Until the French blockade of Formosa, the only record of a "neutral" protest at such behavior is that of the Hanse which expressed disapproval of the practice of pacific blockade as employed by France against Mexico. "En vain on feuillette les traités sur le droit des gens pour recontrer le blocus dans l'énumération des moyens de terminer les differends nationaux sans avoir recours à la guerre. Certainement ils ne l'approuveraient guères dans une étendue qui fait souffrir d'autres nations que celle de laquelle il s'agit d'obtenir le redressement de quelque grief. . . ." [90] When British merchants appealed to Lord

88. *Ibid.*, vol. 95, pp. 114, 115.

89. For cases see Alphonse de Pistoye et Charles Duverdy, *Traité des Prises Maritimes* (Paris, 1855), vol. I, pp. 383–389. These cases are of little interest, however, as the Prize Courts, in accord with French practice, merely enforce the government's decree without considering its status under international law.

90. Horst P. Falcke, *Le Blocus Pacifique* (Leipzig, 1919), p. 56*n*.

Palmerston for government support against the same blockade, he refused to make any formal protest.

Although the American bombardment of Greytown resulted in extensive destruction of British property and set fire to the British Consul's residence, over which the Union Jack was flying, the British Government refused to interpose on behalf of their subjects. A question in the House of Commons some years later led Palmerston to an extended defense of his policy. "It is undoubtedly a principle of international law," he said, "that when one Government deems it right to exercise acts of hostility against the territory of another Power, the subjects and citizens of third Powers, who may happen to be resident in the place attacked, have no claim whatever upon the Government which in the exercise of its national rights, commits these acts of hostility. British subjects in Greytown had no ground upon which they could call upon the Government of this country to demand from the Government of the United States compensation for the injuries which they suffered in the attack upon that town. We may think that the attack was not justified by the cause which was assigned. But as an independent State, we have no right to judge the motives which actuated another State in asserting their rights and vindicating wrongs which it supposed its citizens or subjects had sustained. . . ." [91]

In response the question was raised whether deliberate destruction by a small power of property over which the British flag flew would have been similarly accepted and suspicions were voiced that the Government had been led to compliance more by an appreciation of the strength of the United States than by any abstract respect for its rights.[92]

Two occasions on which neutral protests were effective in changing the character of pacific blockade should, however, be noted. In 1884 the British Government objecting to the French proposal to seize neutral ships in its pacific blockade of Formosa declared, with remarkable disregard of past practice, that the contention of the French Government that pacific blockade gave the blockading power the right to capture and condemn the ships of third nations for the breach of

91. Hansard, 3rd Series, vol. 146, p. 41. The French government took a similar stand, see *Perrin* v. *U.S.*, 4 Ct. of Claims (1868), p. 544.

92. Hansard, 3rd Series, vol. 146, pp. 42 *et seq.*

such blockade was opposed to the opinions of the most eminent statesmen and jurists of France and the decisions of its tribunals and was in conflict with well-established principles of international law.[93] As a result of British pressure the French announced in February 1885 that they proposed to exercise belligerent rights during the continuance of the hostilities with China.[94]

In 1902 Secretary Hay informed the Powers proposing to blockade Venezuela that the United States refused to acquiesce in any extension of the doctrine of pacific blockade that might adversely affect the rights of states not parties to the controversy or discriminate against the commerce of neutral nations.[95] Bowing to the objections of the United States, Germany and Britain announced that the blockade was to be a "warlike" rather than a pacific one. December 17, 1902, the American representative in Berlin wrote "I inquired whether it was intended that the warlike blockade should be accompanied by all the conditions attending such naval measures in general, to which he answered that this was the intention of Germany and Great Britain. I inquired further whether it was intended to declare war, to which Doctor von Muehlenberg replied, quite emphatically that the united powers did not then intend to make a declaration of war or to take any hostile step beyond the declaration of a warlike blockade." [96]

Nevertheless, the actual notifications declared only that a blockade had been established and that vessels violating it would render themselves liable to all measures authorized by the law of nations. Nothing was said as to the nature of the blockade. When queried in the House of Commons as to whether war had been declared, Balfour parried with another question, "Does the honorable and learned gentlemen suppose that without a state of war you can take the ships of another Power and blockade its ports?" [97] That the shift from a pacific to a warlike blockade was purely a terminological one became clear in the treaty between England and Venezuela which provided for an exchange of notes confirming certain previous agreements "inasmuch as it may be contended that the establishment of a blockade of Venezue-

93. *British and Foreign State Papers*, vol. 76, p. 426.
94. *Ibid.*, p. 435.
95. *Foreign Relations of the United States*, 1903, p. 420.
96. *Ibid.*, p. 421, 2.
97. Hansard, 4th Series, vol. 116, p. 1491.

lan ports by the British naval forces has, *ipso facto*, created a state of war between Great Britain and Venezuela, and that any treaty existing between the two countries has been thereby abrogated." [98]

On the whole, it may be said that third powers have acquiesced in the infringements of their rights caused by pacific blockades and acts of force short of war and that, in those rare cases where protests were made, such powers have accepted as satisfactory alterations of a purely superficial character. Whether such acceptance has been motivated by indifference or by a cautious anticipation of the subsequent usefulness

98. *British and Foreign State Papers*, vol. 96, p. 100. The right of Germany, Great Britain, and Italy to demand preferential treatment in the settlement of claims in consequence of their participation in the blockade was hotly disputed and the question was finally submitted to the Permanent Court of Arbitration. In the correspondence that preceded submission of the question to the Court, Herbert W. Bowen, American Minister acting as arbitrator declared "I cannot accept even in principle that preferential treatment can rightly be obtained by blockades and bombardment. It would be absolutely offensive to modern civilization to recognize that principle . . ." J. H. Ralston, *Venezuelean Arbitration of 1903*, 58th Congress, 2d. Sess. Senate Document 316 (Washington, 1904), p. 1039. The United States, France, Belgium, and Venezuela opposed preferential treatment chiefly on the grounds that the use of force to settle a claim that might have been submitted to arbitration should not be allowed to result in advantages for the states employing forceful methods. The Boxer Indemnity was cited as a case in which the powers participating in measures of force received no advantage over those powers which had not. The French raised the question "Can the use of force, however justified it may be . . . constitute a just cause of preference?" and answered their own question with the assertion that such use of force could not alter the rights of third parties. To this the British replied ". . . the contention on behalf of the other creditor powers, if it be put forward as a matter of legal right, must come to this, that, at the conclusion of any war, a neutral is entitled to interpose between the successful and the unsuccessful belligerent, and to demand, as of right, to share in the fruits of victory on the grounds that he too had claims against the vanquished, although he took no steps to enforce those claims, and had not protested against the action taken by the other belligerent to enforce his claims. Such a proposition can, it is certain, find no precedent in the history of nations . . . The same observations apply equally to those methods stopping short of war, by which international demands are commonly enforced. Reprisals, embargo, and other like methods of coercion are processes put in force by individual nations for their own purposes; they confer no advantages and no rights on third parties." The tribunal decided in favor of the blockading powers principally on the basis of the protocols between the parties and with little reference to the principles for which the "pacific" powers had contended. See James Brown Scott, *Hague Court Reports* (First Series, N.Y., 1916), p. 56 *et. seq.* and *The Venezuelan Arbitration Before the Hague Tribunal* (Washington, D.C., 1905).

of the same technique [99] its results are apparent in the dearth of international regulation of the practice of public reprisals.

Reprisals and War

In December of 1652 the French Ambassador addressing the English Parliament assured the Members that his country's feeling of friendship for England would continue even though the latter had replaced the monarchy with a republic. The French king, however, desired "to lodge his complaint for the capture of the ships sent to relieve Dunkirk. He does not feel that he has given any cause for the issue of letters of reprisal against France. The application of these has been defined

99. The attitude of the United States toward projected French reprisals against Venezuela illustrates the willingness of governments to approve the actions of retaliating powers when their own interests do not appear to be menaced. On this occasion, Ambassador Jusserand explored possible American reactions in an interview with President Theodore Roosevelt and Secretary Root. Root's memorandum of the conversation reported it as follows: "The French Ambassador summed up the last information received by his government concerning Venezuela, recalled the torts France has to complain of and the longanimity she had evinced. He added that, if the new demarche to be made by Mr. Russell in accordance with Secretary Root's despatch of December 11, brought no result, a breaking of the relations, followed by coercive measures, could no longer be avoided. The French Government are desirous not to do anything which might give umbrage to the Federal Government, whose kindly assistance in this matter inspires them with sincerest gratitude. But if a rupture occurs, France will have to employ more telling measures than the mere sending of naval vessels in the Venezuelan waters. She would probably be obliged to occupy temporarily one point or another, and seize perhaps some custom house; having recourse, in a word, to means which, while having chances of being felt, would avoid bloodshed.

"The President declared that he quite understood the necessities for such a situation; that the Monroe Doctrine could certainly not be used by southern Republics to shield them from the consequences of their own torts, and that France ought to feel no uneasiness in this particular case. Given especially the friendly and confident dispositions between the two countries it would surely be the easiest matter for France to follow a procedure which would not create such a precedent as would prove troublesome in the future. It might be agreed that as soon as definite plans such as the above have been determined upon by the French Government, their Ambassador would write to the Secretary of State, giving the pledge that there would be no permanent occupation of Venezuelan territory, and that the landing of troops and the eventual seizing of a custom house would be of as limited a duration as possible." Philip C. Jessup, *Elihu Root* (N.Y., 1938), vol. I, pp. 495–6. The forceful action threatened by the French did not materialize, however.

in peace treaties and is reserved for those who may have had justice denied them allowing them to avenge themselves on the property of individuals; but it is unheard of for any nation to extend this practice to the property of a sovereign, its confederate, or to employ the forces of the state to put it in execution, otherwise there would be no difference between letters of reprisal and a declaration of war." [100]

Although the theory expressed here did not prevail, the statement is, nevertheless, a most significant one for it shows how much more closely public reprisals might become involved with the question of war than did private reprisals. Even when private reprisals were carried out by public officials it was generally in the retaliating state's own port and there was consequently little danger of an armed clash. But when public ships were sent out to make reprisals against the public ships of other states, not only was there greater danger of hostile encounters, but also questions of national honor were raised that had not been present in private reprisals. This was particularly true in the reprisals of the nineteenth and twentieth centuries which, whether pacific blockade or act of force, involved an actual infringement of the territorial sovereignty of the offending nation. The victim of reprisals was, of course, free to regard them as measures of war and to act accordingly, but this seldom occurred, largely because of the disparity in strength between the retaliating state and the state against which retaliation was directed.

Thus despite the fact that in practice they approached war more nearly than did private reprisals, public reprisals continued to operate within the framework of peaceful relations and the Powers applying them were given to extensive statements not only of their pacific intent but also of their intention to do nothing more than to effect a redress of their own wrongs. On the occasion of American reprisals against Mexico in 1914, Congress resolved "That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico." [101] On December 17, 1861, General Gasset, commanding the Spanish troops participating in reprisals against Mexico, assured the people of Vera Cruz that "The Spanish troops who occupy your city

100. *C.S.P. Ven.*, vol. 29, 1653–1654, pp. 18–19; *Recueil des Instructions données aux Ambassadeurs et Ministres de France 1648–1789* (Paris, 1929), vol. 24, p. 159.

101. 8 *AJIL* (1914), p. 582.

have no mission of conquest, no interested views. They are led solely by the duty of demanding satisfaction for the non-fulfillment of Treaties, and for the acts of violence committed upon our fellow-countrymen, as well as by the necessity of obtaining guarantees that similar outrages shall not be repeated." [102]

Although it is generally agreed that acts of force undertaken in the name of retaliation do not produce a state of war unless the state that is the object of these acts elects to regard them as warlike, it is sometimes difficult to decide whether or not a state of war has been created by some belligerent act of the victim state. Hogan, for example, holds that the blockade of Argentina (1838–1840) cannot be considered a pacific one as the Argentine issued letters of marque against the French [103] and this was an act of war.[104] Argentina, however, never declared war nor indicated a belief that one existed and it seems unwarranted, therefore, to assimilate her action to a declaration of war rather than to the counter-reprisal so familiar in the earlier period of peacetime retaliation.

The Portuguese case is a much more complicated one in which the characteristics of reprisals and of war seem inextricably combined. French reprisals against Portugal began May 23, 1831, with the seizure of a number of merchant vessels and two warships. These seizures having no effect on Portuguese policy, Admiral Roussin, commanding the operations, addressed a note to the Portuguese Foreign Minister on July 8, 1831, reiterating French demands and adding "Si votre Excellence me fait immédiatement connâitre qu'il est disposé à traiter sur ces bases, et que mon Escadre sera reçue dans les dispositions pacifique, le présent débat peut se terminer sur-le-champ. Dans le cas contraire, la Guerre se trouvant declarée de fait entre la France et le Portugal, toutes les conséquences qu'elle entrâine peuvent être prévues." [105]

Nine days before Roussin's ultimatum, the Portuguese government issued orders to the coastal forts to fire on any vessels coming within range.[106] On July 1 three French ships pursuing a Portuguese vessel

102. *British and Foreign State Papers*, vol. 53, p. 387.
103. See *Le Caiman*, Pistoye et Duverdy *op. cit.*, vol. 1, p. 383.
104. Hogan, *op. cit.*, pp. 90, 91.
105. *British and Foreign State Papers*, vol. 18, p. 407.
106. *Ibid.*, p. 365.

were fired upon by one of these forts. The French ships silenced the forts at the same time doing damage to several houses in the village.[107] On July 10 the Portuguese offered to release two imprisoned Frenchmen and to treat through the Spanish Ambassador in Paris "concerning these matters in a manner conformable with the dignity of the two Nations, and the independence of Portugal."[108] The next day the French squadron entered the Tagus. The ships were fired upon from forts on the shore as they proceeded up river, three Frenchmen being killed and eleven wounded, but the Portuguese ships of war stationed in the harbor surrendered without firing a shot.[109]

It was the determination of France to retain these vessels that created the controversy over the nature of French measures against Portugal. The Portuguese vigorously denied that the *de facto* war threatened by Admiral Roussin in his note of July 8 could produce the legal consequences of *de jure* war "the Government of Portugal having neither provoked or waged war with France; having on the contrary, in its position relatively to France, sought rather to avoid war by every means founded on principles which are authorized by the Law of Nations, and which have hitherto been acknowledged by all civilized States; it is impossible for this Government to admit that a war, *de facto,* waged by France and declared to be such by the Note of your Excellency, dated the 8th instant, could be productive of the same consequences as would result from a war *de jure.* Self-defence being an indisputable right, and common to all Nations, the Government of Portugal could not fail to oppose the violation of its Territory when it saw the French squadron under Your Excellency's command, force its way up the Tagus. . . ."[110] France, the Portuguese argued, had not published a declaration of war nor declared the ports of the kingdom blockaded while Portugal had not issued letters of marque against French ships, nor did she retaliate against French property. This being the case, Portugal contended, France was unjustified in exercising a right of war by retaining the warships.[111]

Britain, to whom the Portuguese appealed for support, regarded the ships as good prize of war. Palmerston's statement to this effect

107. *Ibid.*, pp. 387, 8.
108. *Ibid.*, p. 392.
109. *Ibid.*, pp. 382–4, 409.
110. *Ibid.*, p. 414.
111. *Ibid.*, p. 431.

was based on the advisory opinion of the King's Advocate, Herbert Jenner. Reprisals, Jenner argued, are resorted to "with the view of obtaining satisfaction for injuries alleged to have been received, and in order to prevent the necessity of having recourse to actual hostilities; and may be looked upon as a provisional measure, the character of which is to be determined by subsequent events. If the reprisals should produce a satisfactory result, followed by a restoration of relations of peace between the two Countries, the property seized would be considered as having been placed under temporary sequestration only, and would be restored to the original proprietors. But, should hostilities once commence, the seizure would then assume an hostile character *ab initio;* so that those ships which were seized before as well as those ships which were captured after, that event, would become the property of the capturing State, and the title of the former Owners be divested." The decisive factor, however, is the Convention and whether or not its provisions regarding the release of captured ships "are sufficiently comprehensive to include those Ships of War which were captured after the declaration of hostilities, or whether they only extended to those which had been seized by way of reprisals. If the latter should be the true construction of the Convention, I am humbly of opinion, that the French Government are legally entitled to retain possession of the Ships of War captured in the Tagus, although complete satisfaction may have been received from Portugal of all the demands, to enforce which the hostilities were commenced." [112]

According to this argument, the decision rested with the retaliating state for, if hostilities occurred, seizures ceased to be reprisals not only from the commencement of hostilities but *ab initio.* Jenner's statement, however, is not helpful in discovering whether hostilities in the sense of war may be said to have occurred at all. On the one hand, the question may be raised as to whether a state subject to reprisals does not signify that it regards those reprisals as an act of war when it decides to resist them by force (always excluding the possibility of a declared intention to take counter-reprisals). On the other hand, it may be asked whether a statement by a naval officer, that failure to comply with certain demands will create the existence of *de facto* war between his own country and another, can, under any circumstances, be re-

112. *Ibid.*, pp. 421, 2.

garded as a declaration of war and especially when he produces no evidence that his government has charged him with the responsibility involved.

The use of reprisals as a substitute for war—that is the employment of measures of force to secure an end without creating the legal situation associated with war—has its advantages both for the retaliating state and for the state that is the object of reprisals.

There is no general rupture of treaty relations and although the retaliating state has, for the most part, been able to assume the rights of belligerency, it has not had to accept any of its obligations, and has been able to avoid conflict with neutrals. For the retaliating power, it is certainly a much cheaper policy than war as the measures taken are limited in scope. This is especially so when, as in the case of reprisals against Japan in 1864, the victim of reprisals assumes the obligation to pay for them.[113] The advantages of "La politique des gages" were summed up by Jules Ferry during the French blockade of Formosa in 1884. "À nos yeux cette manière de procéder a trois sortes d'avantages: Le premier, c'est de laisser la porte toujours ouverte aux négociations. Le second c'est de laisser subsister l'état conventionnel antérieur . . . tandis qu'une guerre déclarée eut tout rendu caduc. Enfin, il était d'une sagesse élémentaire de ne pas compliquer notre conflit avec la Chine, de difficultés avec les puissances neutres. . . ." [114]

The chief advantage to the victim in a policy of reprisals lies in their limited objective. To yield will not entail the cession of property or the fulfillment of demands other than those for which reprisals were undertaken.[115] At most the subject of reprisals will be required to pay the expenses of the retaliating expedition; for the rest, it has only to meet the demands of the retaliating state. In the case of pacific blockade, its sequestered ships will be returned; in the case of an act of

113. In the treaty between Japan and the Powers in 1864 it was provided that as it was the duty of the Shogun to suppress the rebellious Daimyo and as his inability to do so had made it necessary for the Powers to undertake naval operations, the Shogun would be required to pay the expenses occasioned by the expedition. *British and Foreign State Papers*, vol. 63, pp. 873, 4.

114. Falcke, *op. cit.*, p. 129.

115. An exception should be noted in the French reprisals against Turkey in 1901. Here Turkey was required not only to fulfill the original demands of France but also to make concessions in the religious sphere which had not been part of the dispute.

force, although there will be no compensation for property destroyed, the victim may be consoled by the reflection that the destruction wrought by war would probably have been much greater. For the most part, therefore, the small states accepted reprisals as nonwarlike and yielded to their pressure,[116] occasionally protesting, as did the President of New Granada in 1837: "Vous savez que l'independance de la Nouvelle-Grenade devient un vain mot, aussitôt qu'une puissance quelconque a le pouvoir de nous dicter des ordres auxquels nous devons nous conformer au détriment de la constitution national, à moins d'exposer le pays aux horreurs de la guerre à laquelle nous ne sommes pas préparés." [117]

Conclusions

Such approval as modern reprisals have received from international lawyers has been based on the argument that they are, at least, less drastic than war. Hogan, in his extensive work on pacific blockade, has said of its use as a reprisal, "Some of the smaller states in the administration of their affairs do not always conform to the ordinary uses of International Law, and when called upon to make redress, defiantly refuse to do so, relying on their very weakness to protect them from any serious harm. In circumstances such as these it is often hardly worth while for a powerful state to go to war, and yet some means should exist of bringing the small state to reason and compelling it to act in accordance with international ideas of righteous dealing. . . . If it is not desired to go to war, some other method of compulsion must be used, and it is here that the practice of pacific blockade has proved so useful." [118]

The implications of this statement are first, that no means of settlement exists other than the use of some kind of force and, second, that if the remedy of reprisal did not exist the offended state would inevitably go to war.

Although it is true that many of the small states have been obstinate in their refusal to come to terms even after long periods of negotiation,

116. Exceptional were the French reprisals against Mexico which were eventually met by Mexico with declarations of war both in 1838 and in 1861.

117. Louis Ducrocq, *Représailles en Temps de Paix* (Paris, 1901), p. 111.

118. Hogan, *op. cit.*, pp. 12, 13.

it is equally true that on several occasions such states have offered to abide by the results of one or another of the internationally recognized methods of peaceful settlement only to be rebuffed by the retaliating power. Thus in 1895 after Britain had protested the expulsion of a number of its subjects from Nicaragua, the latter country granted an unconditional amnesty to the Englishmen involved but asked that the British demand for an idemnity of £15,000 be submitted to arbitration. This request was refused and England subsequently enforced its demands by the occupation of Corinto.[119] Similarly the Siamese request for arbitration of questions in dispute with France [120] and Mexico's suggestion that the Tampico incident be brought before the Hague Tribunal [121] were rejected by the Powers concerned.

The assumption that in cases where states are unable to enforce their demands through diplomacy the alternatives are war or reprisals omits from consideration the actual environment in which reprisals have occurred. In point of fact, alternatives such as these exist only in the relations between great powers and small. In the relations between states more or less equally matched the decision to resort to reprisals, as a technique less productive of inconvenience, bloodshed, or expense than war, is never made for the obvious reason that, as between such states, reprisals will almost inevitably produce war. In these circumstances the alternatives are not war or reprisals but war or an agreement to accept a peaceful settlement whether legal decision or political compromise. When, however, the opponent is a small state unlikely to regard reprisals as a *casus belli* compromise as an alternative to war is apt to give way to retaliation.

Although modern public reprisals have not been abused to as great an extent as were their pre-nineteenth century predecessors, so frequently used as weapons in the conflicts between great powers, they have from time to time been the tool by which states enforced territorial or political demands far removed from the ostensible purposes for which retaliation was originally employed. Both in the blockade of Formosa in 1884 and in that of Siam in 1893 France made use of a policy of reprisals as a weapon in her program of territorial expansion

119. *Foreign Relations of the United States*, 1895, vol. II, pp. 1029–30.
120. *British and Foreign State Papers*, vol. 87, pp. 221, 222.
121. *Foreign Relations of the United States*, 1914, pp. 461–66.

in the Far East. French occupation of the Ruhr in the name of reprisals was criticized as being not an attempt to secure payment of reparations but a step in the French plan to detach the Rhineland from Germany.[122] This accusation was vigorously denied by Poincaré [123] but, whatever its truth, the fact remains that even as an exercise of the right of reprisal granted by the treaty, the French act was highly questionable since the decision of the Reparation Commission that Germany was in default was not unanimous and occupation of the Ruhr was a reprisal in excess of that allowed by the treaty.[124]

Reprisals may equally become involved in political policies in which the offense for which the reprisal in question is ostensibly authorized actually plays but a very small part in the sequence of events leading to the use of force by an offended power. The American bombardment of Vera Cruz in 1914 was a retaliation for the unwarranted arrest of a group of American sailors. But the ensuing occupation was more concerned with the enforcement of a policy which sought to prevent the shipment of arms to the Huerta Government while the mediation which followed was concerned wholly with bringing about a change in the Mexican Government.[125] Its purposes were described by Bryan to the Special Commissioners, "The discussion does not now turn upon terms of accommodation between the United States and Huerta. At the very outset it was understood and it is now obvious to the whole world that Huerta must be eliminated and with him his whole regime. The problem is how peace is to be secured for Mexico and that means simply this: How is this triumph of the Constitutionalist party, which is now clearly triumphant to be accepted and established without further bloodshed? Or put it differently, How are

122. G. E. R. Gedye, *Revolver Republic* (London, 1930), *passim.*

123. Ministry of Foreign Affairs (France), *Diplomatic Correspondence, Reply of the French Government to the Note of the British Government of August 11, 1923 Relating to Reparations* (Paris, 1923), p. 16.

124. Arnold D. McNarr, "The Legal Meaning of War and the Relation of War to Reprisals," 11 *Transactions of the Grotius Society* (1926), pp. 22–30; E. J. Schuster, "The Legality or Illegality of the Ruhr Occupation" 10 *Transactions of the Grotius Society* (1925), pp. 70–80. Henri Lichtenberger, however, defends the French action in *The Ruhr Conflict* (Washington, 1923), *passim.*

125. Samuel Flagg Bemis, *A Diplomatic History of the United States* (N.Y., 1936), pp. 539–553; see also J. Fred Rippy, *The United States and Mexico* (N.Y., 1926), pp. 322–344 for a discussion of the events which preceded and followed the Tampico Incident.

representatives of that party to be placed in control of the government under conditions which can be proved and assented to and earnestly pressed for acceptance by the Government of the United States?" [126]

Nor was this the first time that a Great Power, under cover of reprisals, had sought to bring about a change in the Mexican government. In 1861 England, France, and Spain undertook joint reprisals against Mexico. But by 1862 it had become obvious that the French were giving active support to the Reactionary Party then in rebellion against the Government and in April of that year England and Spain withdrew their support from the occupation for this reason.[127]

Even if they are not abused in such fashion, peacetime public reprisals are essentially lawless, much more so in fact than private reprisals which were regulated by an extensive body of more or less uniform municipal laws as well as by treaty. The modern public reprisal is regulated neither by the law of peace nor by the law of war, neither municipally nor internationally.

The attitude of modern national courts to the legality or illegality of acts of retaliation was exemplified in an American case, *Perrin v. the U.S.*, a case in which the claimants, French subjects, asked compensation for their goods destroyed in the bombing of Greytown. Denying them compensation, the Court declared, "The claimant's case must necessarily rest upon the assumption that the bombardment and destruction of Greytown was illegal and not justified by the law of nations and hinging upon that, it will be readily seen that the questions are such as can only be determined between the United States and the government whose citizens it is alleged have been injured by the injurious acts of this government. They are internationally political questions, which no court of this country in a case of this kind is authorized or empowered to decide. They grew out of and relate to peace and war, and to the relation and intercourse between this country and foreign nations. They are political in their nature and character and under our system belong to the political departments of the government to define, arrange, and determine. And when the questions arise incidentally in our courts the judiciary follow and adopt the action of

126. *Foreign Relations of the United States*, 1914, p. 523.
127. *British and Foreign State Papers*, vol. 53, pp. 530–2.

the executive and legislative departments, whatever that may be. . . ." [128]

War is a legal condition regulated by international law. Reprisals, on the other hand, while themselves recognized by international law are not regulated by it and do not produce a legal situation distinct from either peace or war. Acts of force short of war taken in the name of retaliation have frequently involved measures, such as the bombardment of open towns which have been regarded as illegal in time of war. Pacific blockade has generally been enforced in accord with the laws of wartime blockade but even here there has been no uniformity on the crucial question of the rights of third states and should a retaliating power decide to depart completely from the laws of blockade it is to be doubted that there is any rule to stop it from so doing.

128. 4 Court of Claims (1868), p. 547.

SECTION TWO

Retaliation in Naval War

CHAPTER IV

Neutral Retaliation in the Seventeenth and Eighteenth Centuries

IN THEIR maritime encounters, particularly in their attacks on each other's commerce, belligerents are limited in the measures they may employ by whatever commonly accepted rules protect the interests of neutrals in any given period. Neutrals, similarly, are limited in their commerce with belligerents by rights accorded to the latter. In the endless conflict for advantage between belligerents and neutrals, through which the law of neutrality has been created, public reprisals have been employed by both sides. Belligerents have claimed that their opponents are violating the laws of war and that they, therefore, have the right to take similar measures in retaliation, while neutrals, by resorting to reprisals, have sought to impose upon belligerents a respect for their claimed rights.

At times the struggle between neutrals and belligerents, with the retaliatory aspects of which this chapter is particularly concerned, never reaches the surface and a mere estimation of a neutral's strength and the possibility that, at some point in the future, it may be employed on the side of the enemy is sufficient to deter the belligerent from invading what the neutral considers to be its legal rights. At other times, particularly when many states are at war and the neutral community is correspondingly small and weak, the belligerents are less wary of offending the neutral powers and tend to assert their claimed rights to a degree that may be exceedingly damaging to the neutral position. On such occasions a neutral may be forced through sheer weakness to acquiesce, or may be driven into the camp of one of the belligerents, or, again, may endeavor to protect and improve its position by bringing some kind of force against the offending belligerent without resort-

ing to war and so may decide to embark upon a policy of reprisals.

It is not until the seventeenth century that evidence has been found in any quantity of the use by neutrals of the weapon of retaliation,[1] while belligerent retaliation, intermittently employed in the seventeenth and eighteenth centuries,[2] did not become a major weapon until the issuance of the Berlin Decree in 1806. French reprisals against England in 1625 were caused in part by the latter's policy of seizing French merchant ships accused of carrying Spanish goods [3] while, between 1690 and 1693, three armed neutralities were organized with the intention of employing reprisals to enforce neutral claims, should other methods fail. From 1690 to the fall of Napoleon neutrals resorted to retaliation repeatedly, either in groups or individually. In the frequent and widespread wars of the period, neutral groups were almost always in a minority and their ranks were rarely strength-

1. D. A. Gardiner has said of neutral reprisals in the fourteenth century, "This system of taking reprisals must obviously have operated very powerfully in restraining the attempt to restrict the trading activities of neutrals, since a refusal to grant an order for restitution of a ship or goods, which had been arrested only because the former had been in communication with an enemy, would result in reprisals, counter-reprisals and probably hostilities and the severance of trading relations." This conjecture, although a most logical one, has but little evidence to support it. Gardiner himself gives two examples—one case in 1334 in which Flemish goods destined for the Scottish had been taken by England only to be restored on petition of English merchants whose goods had been seized in Flanders in reprisal, and another in 1312 when English goods were arrested in reprisal for a ship the British had taken and burned on the charge that it was being employed in the Scottish interest. *loc. cit.*, pp. 541, 541*n*.

2. Spain, for example, responding to Russia's declaration of the principles of the Armed Neutrality in 1780, justified her conduct as a belligerent on retaliatory grounds. The Spanish declared of the Russian statement: "It is yet more agreeable that the principles adopted by this sovereign should have been the same as have always guided the King and which His Majesty has for a long time, but without success, endeavored to cause England to observe, while Spain remained neuter. These principles are founded in justice, equity, and moderation . . . and it has been entirely owing to the conduct of the English navy, both in the last and the present war (a conduct wholly subversive of the received rules among neutral Powers) that His Majesty has been obliged to follow their example; since the English paying no respect to a neutral flag, if the same be laden with effects belonging to the enemy, even if the articles should not be contraband, and that flag not using any means of defending itself, there could not be any just cause why Spain should not make reprisals to indemnify herself for the great disadvantages she must otherwise labor under. . . ." James Brown Scott, *The Armed Neutralities of 1780 and 1800* (New York, 1918), pp. 279, 280.

3. *C.S.P. Venice*, 1625–1626, 1626–1628, *passim*.

ened by large powers. In the late seventeenth century, neutral reprisals were undertaken during the War of the League of Augsburg in which the Emperor, Spain, Sweden, Britain, Holland, and France numbered as belligerents. Frederick the Great retaliated against claimed British violations of Prussian neutral rights in the years when an Anglo-French war and the War of the Austrian Succession were raging simultaneously. The Armed Neutrality of 1780 which agreed to employ reprisals against belligerents refusing to accede to neutral claims was organized while Britain fought France, Spain, and Holland and her rebellious American colonies as well. From 1789 to 1815 the entire Western world participated intermittently in the wars of the French Revolution and the Empire. This period saw the organization of two armed neutralities, one in 1794 and one in 1800, pledged to resort to reprisals if necessary, as well as independent Russian reprisals against Britain in 1800, independent American reprisals against France in 1799, and against Britain and France between 1807 and 1812.[4]

Legal Basis of Neutral Reprisals

Denial of Justice

Neutral reprisals, like peacetime private and public reprisals have been justified as the response to an initial illegality perpetuated in a denial of justice. The French order of 1627 sequestering all British goods in France did so, it was declared, "Dès lors que les Anglois, au préjudice de la Paix . . . ont commencé de dépreder nos Sujets à la Mer, d'emmener leurs Vaisseaux & Marchandises en Angleterre, arrête ei qui leur appartenoit audit Paiis, & contre le droit de gens, jugé de bonne prise, & fait confisquer & vendre le tout à leur profit. . . ." [5] Similarly, the American Congress authorized reprisals against France in 1798 because "armed vessels sailing under authority or pretense of authority from the Republic of France have committed depredations on the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations and treaties between the United States

4. American reprisals against England and France between 1807 and 1812 are discussed in Chapter V.

5. Dumont, *op. cit.*, vol. V, p. 506.

and the French nation." [6] Anticipated illegalities, moreover, might lead to an agreement to combat them with reprisals as was the case when Denmark and Sweden agreed to resort to reprisals "if the unfortunate case should arise that any Power, in contempt of treaties and the universal law of nations, will not respect the basis of society and the general happiness, and shall molest the innocent navigation of the subjects of Their Danish and Swedish Majesties. . . ." [7]

The concept of denial of justice as it was applied to neutral reprisals was complicated by the neutral tendency to deny the competence of belligerent prize courts. Thus, while neutrals might from time to time claim that actual decisions had been unjust [8] they were equally likely to base their case on the contention that the belligerent prize court itself had no final legal authority. The Armed Neutrality of 1693 indeed went so far as to arrange for the adjudication of prize cases by the Ambassadors of the signatory powers who agreed that, if their demands for reparations arising out of these adjudications were not met, they would resort to reprisals.[9]

At no time did the contrast between belligerent and neutral attitudes toward prize court jurisdiction emerge more clearly than during the controversy over the refusal of Frederick the Great to pay the Silesian Loan. The Law Officers of the Crown, upholding the view that prize cases could be adjudicated only by the courts of the power taking the prize,[10] argued that Prussian subjects whose property had been confiscated in consequence of prize court decisions could not claim a denial of justice for "Where the Judges are left free, and give Sentence

6. James Brown Scott, *The Controversy over Neutral Rights Between the United States and France* (New York, 1917), p. 56.

7. Scott, *The Armed Neutralities*, p. 443.

8. See, for example, the Swedish complaint to Great Britain of 1801 which spoke "of the inquisitorial examinations [to] which the captains and crews of the ships detained . . . have been subject . . . of the deceitful chicanery with which the proceedings of the courts of admiralty were accompanied; of the absolute denial of justice in many instances. . . ." *Ibid.*, p. 587.

9. Carl J. Kulsrud, *Maritime Neutrality to 1780* (Boston, 1936), p. 314.

10. "Each Crown has, no doubt, an equal Right to erect Admiralty Courts for the Tryal of Prizes taken by Virtue of their respective Commissions; but neither has a right to try the Prizes taken by the other, or to reverse the Sentences given by the other's Tribunal. The only regular Method of rectifying their Errors, is by Appeal to the superior Court." Ernest Satow, *The Silesian Loan and Frederick the Great* (Oxford, 1915), p. 96.

according to their Conscience, though it should be erroneous, that would be no Ground for Reprisals. Upon doubtful Questions, different Men think and judge differently; and all a Friend can desire is, that Justice should be as impartially administered to him, as it is to the Subjects of that Prince, in whose Courts the Matter is try'd." [11]

The French, whose good offices had been requested by the British, took the contrary position in line with their policy of supporting any strong neutral action likely to restrict British maritime activity. The opinion as to denial of justice expressed by the English jurists, they held, applied only when the case was one between individuals and not when it was one between sovereigns as were questions of prize. Prize cases, the French argued, could be decided provisionally by the captor's own courts but, should the Power concerned object to the decision, a refusal to refer the case to arbitration or some other means of settlement would constitute a denial of justice and would justify reprisals. The existence of treaties that provided for the judgment of prizes in courts of admiralty did not, according to the French argument, derogate from the sovereign's right to interpose if the decision were thought unjust unless that right had been specifically renounced. "Ces traités sont autant de preuves que les Souverains ont le droit de requérir que la discussion des prises soit remise à des commissaires respectifs; Qu'enfin chaque Souverain se réserve le droit de faire rendre justice à ses Sujets ou d'user de représailles." [12]

Despite neutral opposition, however, belligerents continued to claim jurisdiction for their prize courts and, in 1801, Danish complaints against Britain, advanced as a basis for reprisals, reiterated the neutral argument. "The British Government . . ." Denmark's representative declared, "has, in the present more than in any former war, usurped the sovereignty of the seas; and by arbitrarily framing a naval code, which it would be difficult to unite with the true principles of the law of nations, it exercises, over the other friendly and neutral Powers, an usurped jurisdiction, the legality of which it maintains, and which it considers as an imprescriptible right, sanctioned by all the tribunals of Europe. The sovereigns have never conceded to England the privilege of calling their subjects before its tribunals, and of subjecting them to its laws, in cases where the abuse of power has got the better of equity,

11. *Ibid.*, p. 83.

12. *Ibid.*, pp. 360–365.

and which, alas! are but too frequent. The neutral Powers have always had the precaution of addressing to it the most energetic reclamations and protests, but experience has ever proved their remonstrances fruitless; and it is not surprising, that, after so many repeated acts of oppression, they have resolved to find a remedy against it. . . ." [13]

As in the case of peacetime reprisals, private and public, diplomatic action was generally regarded as a prerequisite to neutral adoption of a policy of retaliation. Neutral announcements of an intention to resort to reprisals generally included complaints of failure to achieve satisfaction through diplomatic channels. The French declaration of 1627 stated, "nous avons au même temps employé tous les moiens convenables pour faire cesser ces desordres, & par toutes sortes de voies honorables, tâches de faire mettre à effet les promesses frequentes qui nous ont esté faites de leur part, de la restitution des Marchandises & autres choses dépredées & arrêtées audit Pais. . . ." [14] According to the Swedish reprisal announcement of 1801, "His Swedish Majesty must, doubtless, state among the offenses of which he has cause to complain, that after one of his Ministers had been sent to the British Court, its aggressions, instead of being admitted and remedied, were justified." [15]

Provisions for prior resort to diplomatic action were a common feature of treaties, both those entered into between belligerent and neutral and those that established neutral leagues committed to enforcing their demands through reprisals if success could be achieved through no other means. In the Treaty of Copenhagen, neutral Denmark committed itself not to resort to reprisals against England and Holland, then at war with France, until four months after a refusal by the belligerents to satisfy a formal demand for reparation.[16]

Allied neutrals made elaborate arrangements for seeking justice should their rights be violated and for resorting to action only after such justice had been denied. The treaty signed by Russia and Denmark in July, 1780, to which the powers making up the First Armed Neutrality were subsequently to adhere, bound the parties to prohibit the carrying of contraband by their nationals and to defend the prin-

13. Scott, *The Armed Neutralities*, pp. 580–581.
14. Dumont, *op. cit.*, vol. V, p. 506.
15. Scott, *The Armed Neutralities*, p. 587.
16. Kulsrud, *op. cit.*, p. 312.

ciples of neutrality asserted in the Convention. It then went on, "If, notwithstanding the vigilant and amicable care of the two high contracting Powers, and the most exact observation of neutrality on their part, any Russian or Danish merchant ships should happen to be insulted, pillaged, or taken by the ships of war or privateers of one or the other of the belligerent Powers, the Minister of the offended party at the Court whose ships of war or privateers have been guilty of the said act shall make proper representations; he shall demand restitution of the seized merchant ship and shall insist upon a reasonable compensation for the damages, as well as upon a complete satisfaction for the insult offered to the flag of his sovereign. The Minister of the other high contracting Power shall second and support these representations in the most serious and efficacious manner, and thus they shall continue jointly and unanimously until their request is granted. But in case of a refusal, or any unreasonable delay from time to time to redress these grievances, Their aforesaid Majesties do hereby declare, that they will make use of reprisals towards that Power that refuses to do them justice. . . ." [17]

Rights in Defense of Which Neutrals Resorted to Reprisals

The neutral rights traditionally defended by reprisals were seldom universally recognized or firmly established. While neutrals described their demands as rights, belligerents were prone to reply that their objectionable practices, far from being illegal, were well established in international law. But if the rights for which neutrals contended were not always well established in international law, neither were they the arbitrary expression of the momentary interest of the particular neutral involved. Rather, a study of neutral reprisals shows that the same rights were contended for, the same actions denounced, again and again, regardless of the countries concerned or the fact that these countries, when belligerent, might deny to others the very rights they claimed as neutrals.

Danish reprisals against the Dutch and English in 1690 were taken in defence of the principle that free ships make free goods and of the general right of the neutral to trade with all belligerents.[18] The next year, Denmark joined Sweden in an armed neutrality asserting the

17. Scott, *The Armed Neutralities*, p. 303.
18. Kulsrud, *op. cit.*, pp. 305, 312.

right of ships whose innocent cargo had been guaranteed by convoys to sail freely without being subject to search or seizure.[19] Two years later the two countries again joined forces in the agreement of 1693 denying the competency of belligerent prize courts.[20] Prussian reprisals against England in 1753 were based on the British policy of treating *bois de construction,* cordage, sails, hemp, flax, and tar as absolute contraband, refusing to accept the principle that non-contraband enemy goods on neutral ships were free, and insisting on the absolute jurisdiction of British prize courts over neutrals.[21]

In February, 1780, the Russian statement of neutral rights was published. It demanded recognition of the freedom of neutrals to engage in belligerent coastal trade; the principle that free ships make free goods; the limitation of contraband to the commodities included in the Anglo-Russian treaty (ammunition, matches, guns, cannon, bridles, sulphur, saltpetre, and not *bois de construction*); and the principle that a blockade to be legal must be effective.[22] These principles together with the demand that prize court proceedings be fair and honest were the foundation of the Armed Neutrality of 1780.

In 1799 the United States seized French ships in defence of the principle that free ships make free goods and in protest against unjust procedure in the French prize courts.[23]

The conventions by which the Armed Neutrality of 1800 was created asserted as legal rights practically every principle that had previously been contended for by retaliating neutrals. Prohibiting traffic in contraband to their subjects, the signatories defined contraband as actual weapons and ammunition, armor, saddles, bridles, saltpetre and sulphur. They demanded recognition of the principle that free ships make free goods, asserted the right of neutrals to participate in the coastal trade of belligerents, and insisted that blockades were legal only when effective. The declaration of the commanding officer of a convoy, composed of public ships, that the vessels under his escort carried no contraband was to be accepted as sufficient; neutral vessels were not to be arrested without just cause; and fair quick prize court proceedings were to be provided by the belligerents.[24]

19. *Ibid.,* p. 311.
20. *Ibid.,* p. 314.
21. Satow, *op. cit.,* pp. 12–67.
22. Scott, *The Armed Neutralities,* p. 274.
23. *Foreign Relations of the United States,* vol. I, p. 302.
24. Scott, *The Armed Neutralities,* p. 538.

Methods

Types of Retaliatory Action

Although the principle of neutral impartiality was not firmly established until the end of the eighteenth century,[25] it is apparent that a neutral adopting reprisals against one party to an armed conflict is subjected to the danger that the warring power against which its action is taken may construe the reprisals as a belligerent act. Retaliating neutrals were, of course, careful to point out that they were deserting a policy of impartiality only to seek satisfaction of their just demands. Thus, Catherine the Great in 1780, putting forth the principles of neutrality which she supported as law, declared that "To maintain them, and to protect the honor of her flag, the security of the trade and navigation of her subjects [Russia] is preparing a considerable part of her maritime forces. This measure will not, however, influence the strict neutrality she does observe, and will observe so long as she is not provoked and forced to pass the bounds of moderation and perfect impartiality. It is only in this extremity that her fleet will have orders to go wherever honor, interest and need may require." [26]

The question of what measures a neutral may adopt that will fulfill retaliatory ends without causing the neutral to act in a belligerent fashion has been little discussed either by retaliating states or by jurists.[27] It seems probable, however, that a state would be regarded as forfeiting neutrality should it give direct aid to one belligerent in the name of reprisals against its enemy. Most neutral reprisals have represented a direct response to the belligerent act against which the complaint lay in the first place. Neutrals, therefore, have generally resorted to measures directed against the shipping and trade of that belligerent whose measures against their own shipping and trade they regarded as illegal. Frequently reprisals consisted merely in the seizure of such ships and goods of the offending state as happened to be within the jurisdiction of the retaliating neutral. In 1800, for example, the Russian Emperor ordered reprisals against Britain, "having been in-

25. Harvard Law School, Research in International Law, "Rights and Duties of Neutral States in Naval and Aerial War," 33 *AJIL* 3 (July, 1939), Section 2, p. 233.

26. Scott, *The Armed Neutralities*, p. 274.

27. Harvard Law School, Research in International Law, "Rights and Duties of Neutral States," *loc. cit.*, p. 330.

formed of the acts of violence which the English have committed against Denmark and having learned that an English squadron has passed the Sound, an event which by causing this passage to be closed, has severely affected the entire commerce of the Baltic." In consequence, all British property was to be sequestered.[28] This order, issued in August and later supplemented by others, resulted in the seizure of about two hundred ships by November.[29]

More violent were American reprisals against the naval policies of the Directory. These operations, involving seizures of French public ships on the high seas, were sufficiently extensive to merit description as "The Naval War of 1799." On May 28, 1798, Congress authorized public armed ships of the United States to bring into port any armed French vessel that had either committed depredations on American vessels or was hovering on American coasts for that purpose, and to retake any American ship captured by such vessel. Captured French ships were to be proceeded against according to the laws of nations.[30] On June 25th of the same year an act was passed allowing American merchantmen to defend themselves against attempts by French vessels to search or detain them; they might also recapture any American ship captured by vessels sailing under French colors.[31] On July 9th these measures were reinforced by the provision that public armed ships might seize French armed vessels wherever found as might private armed ships properly licensed.[32] Captured ships were to be duly proceeded against and their value distributed among the captors. Under these laws an American fleet of forty-five ships of war captured about eighty-five French vessels of which seventy were condemned.[33] Commissions were issued to about three hundred and sixty-five armed merchant ships [34] but no captures were made by such vessels.[35]

28. Scott, *The Armed Neutralities*, pp. 493, 494.

29. F. T. Piggott and G. W. T. Omond, *Documentary History of the Armed Neutralities, 1780–1800* (London, 1919), p. 425.

30. Scott, *The Controversy over Neutral Rights*, p. 56.

31. *Ibid.*, pp. 59–61.

32. To prevent piracy, it was provided that no armed ship would be allowed to leave an American port without giving bond, in the form of a sum equal to double the value of the vessel, not to commit depredations against ships of countries in amity with the United States.

33. Bemis, *op. cit.*, pp. 120, 121.

34. United States Navy Department, *Naval Documents Related to the Quasi-War Between the United States and France* (Washington, 1935), p. VI.

35. Scott, *The Controversy over Neutral Rights*, Hooper v. U.S., p. 377.

The measures of retaliation adopted by Frederick the Great against British prize policies were of a more unusual nature, taking the form of a refusal to pay to English creditors the Prussian obligations known as the Silesian Loan. Condemning this action as illegal the British Law Officers of the Crown declared "It will not be easy to find an Instance, where a Prince has thought fit to make Reprizals upon a Debt, due from himself to private Men. There is a Confidence that this will not be done; a private Man lends Money to a Prince, upon the Faith of an Engagement of Honour, because a Prince cannot be compelled like other Men, in an adverse Way by a Court of Justice." [36] Frederick, however, claimed that he was acting both legally and mildly and said "Les sujets anglois qui sont les plus intéressés dans cette affaire, trouveront peut-être moyens, à l'aide du Parlement, d'inspirer au ministère anglois des sentiments plus équitables ou de forcer les armateurs au payement réel des sommes liquidées dont ils sont comptables aux sujets prussiens, à quel effet ceux-ci transportent dès ce moment aux rentiers intéressés à la dette de la Silésie tous les droits qu'ils ont contre les susdits armateurs." [37]

Less drastic than the seizure of ships or property were policies that merely closed the ports of the retaliating state to the ships of the offending power or ordered that all trade with that power cease. In March, 1801, Prince Charles of Hesse occupied Hamburg at the command of the king of Denmark in order to carry out the exclusion of British commerce from the Elbe.[38] At the same time, Frederick of Prussia, also a member of the Armed Neutrality, announced his intention of closing the mouth of the Elbe, the Weser, and the Ems and also of taking possession "of the States belonging to His Majesty the king of England as Elector of Brunswick Lüneburg, situate in Germany." [39] Similar but much more extensive were the measures employed by the United States during the Napoleonic Wars by which, at one point, commerce with the belligerents was cut off completely.[40]

Objects of Retaliatory Action

As has been pointed out, private reprisals were generally directed at securing compensation for a loss that could be defined in monetary

36. Satow, *op. cit.*, p. 97. 37. *Ibid.*, p. 70.
38. Scott, *The Armed Neutralities*, p. 590.
39. *Ibid.*, p. 593.
40. For detailed discussion see Chapter V.

terms while later peacetime public reprisals were usually coercive in nature and aimed at securing the cessation of an act complained of. Neutral reprisals in the period in question displayed both these features.

In 1690, for example, the Danish, adopting a policy of reprisals against the Dutch, then at war with France, seized Dutch ships in their harbors and territorial waters. These vessels were held to ensure that the Dutch would grant compensation to Danish merchants who had suffered from what their government regarded as violations of their neutral rights by the Dutch.[41] A few years later, Denmark joined Sweden in an Armed Neutrality. The two powers agreed that if they failed to receive satisfaction by the peaceful methods outlined in the treaty they would seize from the subjects of the offending belligerent a sufficient number of ships to compensate for the injury suffered by the neutral traders and to defray the expenses of the process of seizure.[42]

In 1800, Russia issued a reprisal order which, while compensatory in nature, anticipated a need for compensation more than it provided for the satisfaction of claims that had already arisen. In this sense it was coercive as well as compensatory. The order read: "His Imperial Majesty, having been informed of the acts of violence which the English have committed against Denmark, and having learned that an English squadron has passed the Sound, an event which, by causing this passage to be closed, has seriously affected the entire commerce of the Baltic, has ordered that, as security against the damage that may result therefrom to Russian commerce, the real designs of the English being as yet unknown, all property belonging to Englishmen be sequestered. . . ." [43]

Measures that involved action other than the actual seizure of property were generally clearly coercive in intent. Thus the measures taken by Prussia and Denmark in 1801 in an effort to exclude British trade from the Elbe, the Weser, and the Ems were adopted, it was said, as an effective means of bringing the British Government "to a more just way of thinking." [44]

41. Kulsrud, *op. cit.*, pp. 305–311. 42. *Ibid.*, p. 314.
43. Scott, *The Armed Neutralities*, pp. 493, 494.
44. *Ibid.*, p. 590.

Conspicuously coercive in character were the retaliatory measures that the United States adopted against France in the years between 1798 and 1800. These measures, indeed, became involved later in the century in considerable controversy as to their exact nature. Thus in May, 1886, in delivering the judgment of the Court of Claims in *Grey v. U.S.*, Justice Davis defined the events of the three years as "limited war in its nature similar to a prolonged series of reprisals." [45] Seven months later, in presenting the decision of the court in *Cushing v. U.S.*, Davis arrived at slightly different conclusions denying that the United States had resorted to a policy of reprisals between 1798 and 1800 on the grounds that the acts of that period were coercive rather than compensatory. "We do not attempt," he said, "to lay down any general rule of law on this question of reprisals, but a study of the authorities leads to the conclusion that the action is affirmative and aggressive in character, having for its object compensation. The essence of reprisals has been said to be security—that is, the seizure of property for protection until just claims are settled, but we do not see that the principle of compensation is thereby changed, as the seizure of property for security must be directed by an effort to obtain security sufficient in amount to provide compensation should the demand for redress be unsuccessful." The statutes in question, Davis declared, were not aggressive but entirely defensive; their aim the defense of our merchantmen not depredations upon the commerce of France; not compensation for losses or security for demands ". . . but protection and safety in the future. . . ." For these reasons they lacked "the essential nature of statutes of reprisals. . . ." [46] The decision goes no further into the question of reprisals and it would seem likely that in making this statement, Davis was influenced more by the definitions of the classical writers than by a study of actual practice.

Belligerent Response

Belligerents have generally accepted the right of neutrals to resort to reprisals without losing their neutral status. The one important case in which there seems to be some question as to whether or not the

45. Scott, *The Controversy over Neutral Rights*, p. 261.
46. *Ibid.*, p. 332.

terms while later peacetime public reprisals were usually coercive in nature and aimed at securing the cessation of an act complained of. Neutral reprisals in the period in question displayed both these features.

In 1690, for example, the Danish, adopting a policy of reprisals against the Dutch, then at war with France, seized Dutch ships in their harbors and territorial waters. These vessels were held to ensure that the Dutch would grant compensation to Danish merchants who had suffered from what their government regarded as violations of their neutral rights by the Dutch.[41] A few years later, Denmark joined Sweden in an Armed Neutrality. The two powers agreed that if they failed to receive satisfaction by the peaceful methods outlined in the treaty they would seize from the subjects of the offending belligerent a sufficient number of ships to compensate for the injury suffered by the neutral traders and to defray the expenses of the process of seizure.[42]

In 1800, Russia issued a reprisal order which, while compensatory in nature, anticipated a need for compensation more than it provided for the satisfaction of claims that had already arisen. In this sense it was coercive as well as compensatory. The order read: "His Imperial Majesty, having been informed of the acts of violence which the English have committed against Denmark, and having learned that an English squadron has passed the Sound, an event which, by causing this passage to be closed, has seriously affected the entire commerce of the Baltic, has ordered that, as security against the damage that may result therefrom to Russian commerce, the real designs of the English being as yet unknown, all property belonging to Englishmen be sequestered. . . ." [43]

Measures that involved action other than the actual seizure of property were generally clearly coercive in intent. Thus the measures taken by Prussia and Denmark in 1801 in an effort to exclude British trade from the Elbe, the Weser, and the Ems were adopted, it was said, as an effective means of bringing the British Government "to a more just way of thinking." [44]

41. Kulsrud, *op. cit.*, pp. 305–311. 42. *Ibid.*, p. 314.
43. Scott, *The Armed Neutralities*, pp. 493, 494.
44. *Ibid.*, p. 590.

Conspicuously coercive in character were the retaliatory measures that the United States adopted against France in the years between 1798 and 1800. These measures, indeed, became involved later in the century in considerable controversy as to their exact nature. Thus in May, 1886, in delivering the judgment of the Court of Claims in *Grey v. U.S.*, Justice Davis defined the events of the three years as "limited war in its nature similar to a prolonged series of reprisals." [45] Seven months later, in presenting the decision of the court in *Cushing v. U.S.*, Davis arrived at slightly different conclusions denying that the United States had resorted to a policy of reprisals between 1798 and 1800 on the grounds that the acts of that period were coercive rather than compensatory. "We do not attempt," he said, "to lay down any general rule of law on this question of reprisals, but a study of the authorities leads to the conclusion that the action is affirmative and aggressive in character, having for its object compensation. The essence of reprisals has been said to be security—that is, the seizure of property for protection until just claims are settled, but we do not see that the principle of compensation is thereby changed, as the seizure of property for security must be directed by an effort to obtain security sufficient in amount to provide compensation should the demand for redress be unsuccessful." The statutes in question, Davis declared, were not aggressive but entirely defensive; their aim the defense of our merchantmen not depredations upon the commerce of France; not compensation for losses or security for demands ". . . but protection and safety in the future. . . ." For these reasons they lacked "the essential nature of statutes of reprisals. . . ." [46] The decision goes no further into the question of reprisals and it would seem likely that in making this statement, Davis was influenced more by the definitions of the classical writers than by a study of actual practice.

Belligerent Response

Belligerents have generally accepted the right of neutrals to resort to reprisals without losing their neutral status. The one important case in which there seems to be some question as to whether or not the

45. Scott, *The Controversy over Neutral Rights*, p. 261.
46. *Ibid.*, p. 332.

retaliating state was actually at war was that of the American reprisals against France in 1799. Even here the question was not raised by France but, rather, seemed to be confined to the minds of American jurists. It was the opinion of the Attorney General at this time that "there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations. Consequently, France is our enemy. . . ." [47] Cases decided during hostilities followed this statement and in *Bas v. Tingy* (the *Eliza*) the plaintiff's contention, that the differences between the United States and France did not constitute war, was rejected and it was declared that "every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war . . ." the operations in question being regarded as "imperfect war." [48] The Treaty, however, speaks only of a desire "to terminate the differences which have arisen between the two states . . ." and provides for the restoration of public ships taken on both sides.[49] It would be hard to imply the pre-existence of war from the terms of this agreement and a later decision declares "we are . . . of opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war. . . ." [50] As has been noted, however, the court although content that the events of the period did not constitute war was reluctant to classify them as reprisals.

Belligerents, while continuing to treat retaliating neutrals as neutrals, have not hesitated to resort to counter-reprisals against them. This was particularly the case during the Armed Neutrality of 1800. On January 14, 1801, Lieutenant General Trigge was ordered by the British Government to take possession of the islands of St. Thomas, St. Croix, St. John and St. Bartholomew, together with all ships or public property of any description belonging to Russia, Denmark or Sweden found in the islands.[51] On the same day all Russian, Danish, and Swedish ships in British ports were sequestered by an Order in

47. *Ibid.*, p. 99.
48. *Ibid.*, pp. 106–113.
49. *Foreign Relations of the United States*, pp. 295, 296.
50. Scott, *The Controversy over Neutral Rights*, Grey v. U.S., p. 261.
51. Scott, *The Armed Neutralities*, p. 557.

Council.[52] Until the effect of these measures could be ascertained "His Majesty is disposed to consider them rather as steps of just and necessary precaution . . . with a view to indemnify his own subjects for the injury they have sustained by the confederacy to which those Powers are a party, than as arising out of an actual state of war." [53] Justification for the British action was based not on any accusation that the neutrals had departed from the impartiality which it was their duty to maintain, but that they were attempting "to impose by force on His Majesty a new system of maritime law, inconsistent with the dignity and independence of his Crown, and the rights and interests of his people." [54]

The attitude of belligerents toward neutral reprisals was, of course, influenced by material considerations. Just as Britain as a strong maritime power replied to neutral reprisals by counter-reprisals intended to enforce the British view of international law, so France supported any strong neutral action which might be expected to curtail British activity on the high seas. In 1780, Spain, then allied to France assured the confederated neutrals that their principles of international law were those traditionally supported by the Spanish crown which, however, had been forced by the illegal practices of the British to depart from them. For the future, however, Spain would respect "the neutral flag of all the Courts that have consented, or shall consent, to defend it. . . ." [55]

Effects

The immediate effects of neutral reprisals were dependent to a very large extent on the strength of the states enforcing them. S. F. Bemis says of the Armed Neutrality of 1780–1783 that it "was sufficiently numerous, sufficiently unified in interests, and sufficiently strong to force Great Britain to much greater prudence, and to a mitigation of the severity of her prize laws. It constituted one element in the forces balanced against the United Kingdom that induced British statesmen to come to terms with America." [56] The Neutrality of 1691, on the

52. *Ibid.*, pp. 558, 559.
53. *Ibid.*, p. 558.
54. *Ibid.*, p. 589.
55. *Ibid.*, pp. 279, 280.
56. Samuel Flagg Bemis, "The United States and the Abortive Armed Neutrality of 1794," 26 *American Historical Review* 1 (October, 1918), p. 33.

other hand, although it provided for reprisals on paper, never enforced them due to the mutual distrust of the parties, and was correspondingly unsuccessful.[57] Similarly, the Armed Neutrality of 1794 proved but a paper agreement doomed from the start by the failure of a promised French subsidy, the presence of the Russian and British fleets in the Baltic and North Seas, and the decision of the United States not to participate.[58]

Reprisals or threatened reprisals, however, sometimes produced concessions from the belligerent powers which, while falling far short of accepting neutral contentions, were of practical benefit to the state concerned. Thus Denmark was unable to force the Dutch and British to admit its right to trade with their enemy France in 1693 but was able to obtain a subsidy from them in return for her promise not to attempt to carry on the forbidden trade.[59] Prussian reprisals were brought to an end by the Treaty of Westminster in 1756 which provided for the payment of £20,000 in extinction of all Prussian claims against Britain. The nature of these claims was unspecified and the real purpose of the treaty was to secure an alliance that would protect the king's German possessions against French invasion.[60]

The Treaty of Copenhagen signed by Holland and Great Britain with Denmark was a direct defeat of the principles in defense of which Denmark had resorted to reprisals. The treaty provided that Danish vessels were not to carry enemy property or engage in the French coastal trade. In return Danish ships were to be permitted to sail from their own ports directly to a designated enemy port.[61] The one treaty resulting from reprisals which embodied a clear victory for neutral principles was that signed by Britain and Russia in 1801 to which Denmark and Sweden were invited to adhere. This treaty provided that ships of the neutral power might navigate freely to the ports and upon the coasts of nations at war. Neutral goods were to be free on neutral ships except contraband which was to include only actual weapons and ammunition plus swordbelts, knapsacks, saddles and bridles, salt-

57. G. N. Clark, *The Dutch Alliance and the War against French Trade 1688–1697* (Manchester, 1923), pp. 103–105.

58. Bemis, "The United States and the Abortive Armed Neutrality of 1794," *loc. cit.*, p. 33.

59. Kulsrud, *op. cit.*, p. 315.

60. Satow, *op. cit.*, pp. 196–199.

61. Kulsrud, *op. cit.*, pp. 312, 313.

petre, sulphur, and matches. Blockades to be legal were to consist in sufficient ships "stationary or sufficiently near" the blockaded port to cause evident danger in entering. Neutral ships were not to be stopped except on just cause and evident fact; trials were to take place without delay; and prize proceedings were to be uniform and lawful. Convoyed ships were to be searched only by men of war and then only if their papers were not in good order or good reasons for suspicion existed.[62] On the whole, reprisals in this case were of good effect for of all the rights the neutrals had demanded only that of "free ships, free goods" had been denied absolutely, while concessions had been made on the question of convoy.

Long term effects of neutral reprisals are difficult to determine. Nowhere can it be shown that neutral reprisals were the immediate cause of the adoption of a rule of international law. The most that can be said is that they added to the weight of neutral pressure that led ultimately to the international adoption of such rules as that recognized in the Treaty of Paris of 1856 that free ships make free goods. On the other hand, many of the rights demanded by neutrals and supported by reprisals have continued to be the subject of disputes between neutrals and belligerents down to recent times.

62. Scott, *The Armed Neutralities*, pp. 575–579.

CHAPTER V

The Napoleonic Wars

IN 1801 the principles for which neutrals traditionally contended had been advanced by the victory of the Armed Neutrality as embodied in the Anglo-Russian Treaty of that year.[1] Nevertheless, as Professor Phillips has pointed out "The rules [of war at sea] established by 'the common consent of nations' were actually very few, and by no means covered all contingencies. It was universally acknowledged that neutrals had the right to carry on their accustomed trade with the belligerent nations, except in contraband of war; but there was no consensus of opinion as to what constituted contraband of war, or as to the right of neutrals to take advantage of channels of trade closed to them in time of peace and opened up by the war. It was generally acknowledged that a belligerent had the right to proclaim the blockade of a hostile port, and that, so long as this blockade was effective, neutral ships attempting to 'run the blockade' could be made lawful prize; but there was no agreement as to what constituted effective blockade. Again, while the right to seize enemy property at sea was acknowledged, there was violent disagreement as to the right to seize it, when covered by a neutral flag. The doctrine of 'free ships, free goods' had been embodied in numerous treaties, even in some concluded by Great Britain, but it had never been universally accepted. . . ." [2]

In May, 1803, France and England were at war once again. Peace, under the Treaty of Amiens, had lasted fourteen months. The war was to last almost as many years. Rapidly the other nations of Europe were drawn into the conflict in which, intermittently, all played their parts while even those who, from time to time, managed to resume or pre-

1. *Supra* p. 148.

2. W. Alison Phillips and Arthur H. Reade, *Neutrality: Its History, Economics and Law*, vol. II, *The Napoleonic Period* (New York, 1936), pp. 11, 12.

serve their neutrality found themselves gradually stripped of their accustomed rights. In October and December of the year 1805 the future course of the second Napoleonic war was shaped by Britain's triumph at sea in the battle of Trafalgar and the French triumph over the Continent with the defeat of Austria and, with Austria, of the Third Coalition. There was no question now of an invasion of England but neither was there any hope, for the present, of a military defeat of Napoleon on the Continent. Napoleon could not engage the British navy; Britain could not engage the French army. Each then turned to an intensification of its attack on the commerce of the other.

Exclusion of the goods of Britain and her colonies had long been a popular policy in France and was attempted both by the Convention in 1793 and by the Directory in 1796.[3] Following these precedents, on June 2, 1803, Napoleon decreed the confiscation of all British manufactures and colonial produce imported into France—a measure that was later introduced into Holland as well.[4] This system of exclusion was extended by the occupation of Hanover and the seizure of Cuxhaven which stood at the mouth of the Elbe, while in 1804 occupation of the town of Meppen on the Ems made it possible for Napoleon to bar the imports which went up the Ems to Frankfurt am Main.[5]

In response to French policy, Britain, in May, 1806, modified and extended the principle of blockade in a manner later to become familiar in the retaliatory Orders. Unlike the latter, however, the Order of May, 1806, was not adopted as a reprisal, Napoleon's measures being purely a matter of municipal law. It was, the preamble declared, enacted in consequence "of the new and extraordinary means resorted to by the Enemy for the purpose of destroying the commerce . . ." of His Majesty's subjects.[6]

Britain had already declared a strict blockade of the coast of France from Ostend to the mouth of the Seine River. By the Order of May, 1806, this blockade was extended northward from Ostend to the Elbe

3. Audrey Cunningham, *British Credit in the Last Napoleonic War* (Cambridge, 1910), p. 57.

4. A. T. Mahan, *The Influence of Sea Power upon the French Revolution and Empire* (Boston, 1892), vol. II, p. 263.

5. Eli F. Heckscher, *The Continental System: An Economic Interpretation* (Oxford, 1922), pp. 81, 82.

6. *British and Foreign State Papers*, vol. I, p. 1512.

and southward from the Seine to Brest. But from Ostend to the Elbe and from the Seine to Brest a new principle of blockade was to be put into operation. In these two areas only those neutral ships were to be excluded that were:

1. carrying enemy goods or contraband of war
2. that had been laden at any port in possession of the enemy
3. that were carrying goods to any port in possession of the enemy
4. that had previously broken the blockade.

All other neutrals would be free to leave and enter such ports.[7]

While the British were making their first moves in the attempt to regulate and control neutral trade with the Continent, Napoleon was extending his system of exclusion of British goods from Europe. In October, 1806, Prussia was forced to close her ports to Great Britain and in November the great Hanse towns of Lübeck, Hamburg, and Bremen were seized and incorporated into the area excluding British trade.

These acts were but the initial moves in the war on trade that was to follow. They were also the last important steps taken without the support of retaliatory arguments for despite the confusion and conflicts that existed in international law with regard to the rights of neutrals, both belligerents seemed to be conscious of certain vague limits beyond which they could not normally go and to over-ride which they

7. *Idem.* The legal character of this blockade was, of course, extremely dubious. In the first place, ports "not in the possession of the enemy" that is, neutral ports, were admittedly subject to the blockade. In the second place, while it is legally admissible that exceptions he made in the operation of a blockade as long as they apply impartially to all neutrals, these exceptions were of so peculiar and sweeping a character that it is to be doubted that they come under the protection of this rule. A distinction obviously must be made between exemptions that modify a blockade by permitting neutral trade for a certain length of time, etc., and exceptions such as these which completely change the character of the blockade. Third, the Order violated the rule that the completion of a voyage relieves a ship from liability for breach of blockade. Finally, it is highly improbable that the blockade was effective although Great Britain never admitted that it was not. (See *Foreign Relations of the United States,* vol. III, p. 436.) At this time, of course, it was not yet accepted doctrine that a blockade to be legal must be effective although the Anglo-Russian Treaty of 1801 (cited in Archibald H. Stockder, "The Legality of the Blockades Instituted by Napoleon and the British Orders in Council," 10 *AJIL* [July, 1916], p. 494; (see also *supra* pp. 114–15) and Sir William Scott's decisions in *The Betsey* (1798) and *The Nancy* (1804) supported the principle.

called to their aid the doctrine of retaliation. Thus in November, 1806, with the issuance of the Berlin Decree, justified on the grounds of retaliation, the groundwork for the Continental System had been laid and the excuse provided for Britain's retaliatory Orders in Council. Within a short time, so far-reaching had been the attacks made by belligerents against each other that the neutral right to carry innocent goods to non-blockaded ports disappeared altogether. Neither belligerent denied that its measures against both enemy and neutral commerce would have been internationally illegal under ordinary circumstances. But both denied that the circumstances could be considered to be the ordinary ones of war and claimed that their extraordinary character provided the basis and justification for measures equally extraordinary.

The Retaliatory Acts

The Berlin Decree

The provisions of the Berlin Decree were justified exclusively on the basis of retaliation. Britain's conduct, it was declared, was worthy of "the earliest ages of barbarism" and could be combatted only by similar behavior. The most important accusations made against Great Britain were:

1. "That she extends to merchant ships, and to wares, and to property of private persons, that right of conquest which ought only to be applied to property belonging to the hostile states."
2. "That she extends the right of blockade to commercial unfortified towns, and to ports, harbours, and mouths of rivers, which according to the principles and practice of all civilized nations, is only applicable to fortified places."
3. "That she declares places in a state of blockade before which she has not a ship of war, though no place can be considered in a state of blockade, unless it is so invested that, approach cannot be attempted without imminent danger."
4. "That she even declares places in a state of blockade, which, with all her forces united, she is incapable of blockading, namely, whole coasts and empires." [8]

8. *Foreign Relations of the United States,* vol. III, p. 290; A. Strahan, *Notifica-*

Of these accusations, the last two referred to the nature of the British blockade which, if it was fictitious as the French claimed, was arguably illegal. The first point, however, was so completely vague that it might be construed to mean an objection on Napoleon's part to the seizure of any private property, even contraband. This interpretation is strengthened by a statement in the Decree that its provisions were to continue in force until "England shall acknowledge that the right of war is the same by land as by sea—that it does not extend to private property of any kind whatever . . ." a claim completely without basis in law or fact. Napoleon's contention that only fortified places might be blockaded was similarly weak.

Having described the crimes of which Britain was alleged to be guilty, the Decree went on to say that France has "resolved to direct against England the same system which she has established by her maritime code. . . ." Its provisions, however, set up a system quite different from that established by Great Britain. The British Islands were declared to be in a state of blockade and all commerce or correspondence with British subjects was prohibited. Trade in British merchandise was forbidden and all merchandise of British ownership, manufacture, or colonial produce was declared lawful prize. No vessel coming from Britain, or her colonies, or having been there since November 21, 1806, was to be received in port.[9]

There was obviously no intention that the blockade of Britain should be anything but a paper one. Not only had Napoleon declared that he would direct Britain's own system against her, and that system, as he conceived it, was one of completely fictitious blockade, but even the Emperor himself would not dare to claim that French naval power was equal to the task of actually blockading Great Britain. Given the completely fictitious nature of the blockade, how did the provisions of the Decree affect neutral rights?

The Berlin Decree, like most of those orders which Napoleon intended for the consumption of neutral nations, seemed in its wording deliberately calculated to leave them with no clear impression of what was being complained of, no definite standard of acceptable conduct, and no sure pathway to relief. Neutrals were forbidden to touch at the

tions, Orders, and Instructions, relating to Prize Subjects during the Present War (London, 1809), pp. 52, 53.

9. *Idem.*

British Islands. If they did they might be confiscated upon coming into a French port. But would French privateers have the right to capture them on the high seas? Nobody seemed to know and ten months later the Conseil des Prises was informed that the Emperor had been unable to make up his mind on this question.[10] The situation was clarified somewhat, although not entirely, in Champagny's statement to the American minister General Armstrong. "His Majesty has considered every neutral vessel going from English ports, with cargos of English merchandise, or of English origin, as lawfully seizable by French armed vessels." [11] This interpretation, of course, was in accord with the Decree's provisions that neutrals carrying merchandise of English manufacture or origin but of neutral ownership would be considered good prize. By this regulation the usual criteria for confiscation as prize—the ownership or nature and destination of the goods—were replaced by the criteria of origin or place of manufacture.[12] Similarly the French Government's note to Armstrong might be interpreted as replacing the doctrine of condemnation for violation of an effective blockade, with a wholly new doctrine that relieved the belligerent of any necessity for establishing a blockade by declaring subject to condemnation any neutral ship that had touched at an enemy port.

The provisions of the Berlin Decree supplied the British with an opportunity that they were quick to grasp, and on January 7, 1807, the first Order in Council to be based entirely on the right of retaliation was issued. The French Government had forbidden the commerce of all neutral nations with the British. Neutrals were prohibited from trading in articles which were the growth and produce of His Majesty's dominions. The British Isles had been declared in a state of blockade at a time when the fleets of France and her allies were themselves confined within their own ports by the British navy. These acts, the Order declared, were "in violation of the usages of war [and gave] to His Majesty an unquestionable right of retaliation. . . ." [13]

There can be no doubt that, stripped of their retaliatory character,

10. *Foreign Relations of the United States*, vol. III, p. 25.

11. *Ibid.*, p. 245.

12. These provisions were not altogether novel. The French règlement of 1704 as well as that of 1744 (text in Satow, *op. cit.*, p. 113) confiscated goods of enemy origin in neutral ships *when the vessel was not sailing directly home.* Butler and Maccoby, *op. cit.*, p. 372.

13. *Foreign Relations of the United States*, vol. III, p. 267.

the French acts complained of were illegal. Britain, of course, could only treat them as illegal, for to accept the Berlin Decree as retaliatory would mean that Britain admitted prior illegality on its own part. Thus here, as in all the retaliatory acts, each belligerent described the measures of its opponents as purely arbitrary and dictated by policy while preserving the concept of retaliation for the justification of its own measures.

The Orders in Council

Although, according to its authors, the January Order in Council was a moderate measure by no means exhausting His Majesty's right of retaliation, its provisions were sufficiently sweeping to effect radical changes in the neutral position. According to the Order, no vessel was to be permitted to trade from one port to another where both ports were in the possession of France or its allies or were so far under its control that British vessels might not trade there freely. Any vessel making such a voyage was to be brought in and, together with her cargo, condemned as lawful prize.[14]

By this Order all pretense at effective blockade was abandoned. Trade which neutrals could no longer carry on except at the risk of confiscation by the British included:

1. trade between two ports of one belligerent
2. trade between ports of allied belligerents
3. trade between a belligerent port and the port of a non-belligerent who had excluded British goods [15]
4. trade between the ports of non-belligerents who had excluded British goods
5. trade between two ports of a single non-belligerent who had excluded British goods.

The neutral right to trade with belligerents, except to blockaded places, in any goods but contraband, thus disappears as far as the trade *between* the ports of Britain's enemies is concerned. It is to be

14. *Ibid.*, pp. 267, 268.

15. The British term used here "countries so far under the control of France and her allies that British vessels may not trade there," taken together with the existence of such states which under French pressure barred British commerce but were not at war, would seem to justify the use of the modern term, "non-belligerent," to describe these states rather than "neutral."

noted, however, that neutrals making a direct voyage from neutral or British ports might still trade with enemy ports and ports excluding British goods subject to the restrictions on the coastal area between Brest and the Elbe imposed by the Order of May, 1806.

In August, 1807, the January Order in Council was supplemented by one which applied only to vessels sailing under the flag of four small neutrals, Mecklenburgh, Oldenburgh, Papenburgh, and Kniphausen. Vessels of these states were not in future to trade at any hostile port unless they were going to or coming from a port in the United Kingdom.[16] Although exceedingly limited in scope this order was noteworthy in that it combined the prohibition of the January Order against trade between enemy ports with the requirement, foreshadowing the Order in Council of November, 1807, that ships wishing to trade with Britain's enemies must do so by way of a British port.

By autumn, 1807, the trade in which neutrals could engage without subjecting themselves to the danger of confiscation by one or the other of the belligerents was being increasingly limited. On July 8, 1807, by the Treaty of Tilsit, Russia promised both to close her own ports to British goods and to join Napoleon in demanding that Sweden, Denmark, Portugal and Austria do the same. In September the French Conseil des Prises condemned that part of the cargo of the American ship, the *Horizon,* which was of neutral ownership but British manufacture,[17] a decision which gave notice of French determination, hitherto not clear, to enforce the Berlin Decree by sea as well as by land. In Great Britain, meanwhile, the Tory Portland Ministry was brewing plans for a thoroughgoing revision of the so-called Whig Order in Council of January, 1807. Their labors were reflected in the Order in Council of November 11, 1807.

In the January Order it was intimated that Britain was not at that time exercising her right of retaliation to the fullest degree permissible.[18] The November Order seeking justification in the same illegal acts that had inspired the Order of January set about to correct the weakness of the latter which had not "answered the desired purpose, either of compelling the enemy to recall those orders, or of inducing neutral nations to interpose with effect, to obtain their revocation, but,

16. *British and Foreign State Papers,* vol. I, p. 263*n*.
17. *Foreign Relations of the United States,* vol. III, p. 245. *Infra* p. 174.
18. *Supra* p. 157.

on the contrary, the same have been recently enforced with increased rigor." Since the enemy had failed to withdraw its illegal acts and the neutrals had failed to assert their rights no obstacle remained to the taking of further measures for "asserting and vindicating His Majesty's just rights." [19]

The Order opens with a series of provisions almost the exact counterpart of those of the Berlin Decree.

1. All ports of France, her allies, of any country at war with Great Britain, all enemy colonial ports and all other ports from which, though not at war with Great Britain, her flag is excluded ". . . shall be subject to the same restrictions in point of trade and navigation . . . as if the same were actually blockaded by His Majesty's naval forces in the most strict and rigorous manner."

2. All trade in the produce and manufactures of ". . . said countries or colonies, shall be deemed and considered to be unlawful."

3. Every vessel trading from or to the said countries or colonies "together with all goods and merchandise on board, and all articles of the produce or manufacture of the said countries, or colonies, shall be captured and condemned as prize to the captors." [20]

To this point in the Order, Britain had responded to a complete though paper blockade of its own coasts by a complete though paper blockade of the coasts of the enemy. But these blockade provisions were modified by exceptions which completely changed the character of the Act.

1. A vessel and cargo belonging to any country not subject to the blockade may clear from a port in its own country or from a British colonial port direct to an enemy colonial port.

2. A vessel and cargo belonging to any country not subject to these blockade provisions may clear from an enemy colony for a port in its native country or to a British colonial port.

3. A vessel and cargo belonging to *any country not at war* with

19. *Foreign Relations of the United States*, vol. III, p. 30.
20. *Idem.*

England may clear from an English port, the port of a country allied to England, Gibraltar or Malta "under such regulations as His Majesty may see fit to prescribe" and proceed direct to the port specified in her clearance.

4. A vessel and cargo belonging to any country not at war with Great Britain may clear from any port coming within the provisions of the blockade directly to some port or place in Europe belonging to His Majesty.[21]

In response to the French demand that neutrals coming to French ports show certificates of origin for their cargo from French consuls at the place of lading, the Order further provided that any vessel carrying such a certificate was lawful prize together with that part of the cargo belonging to those on whose behalf the document was put on board.[22]

The Order was accompanied and extended by two others of lesser importance which provided first that any vessel belonging to any country in alliance or at amity with Great Britain might import into Britain articles of the produce of manufacture of countries at war with His Majesty and, second, that the sale to a neutral of any vessel belonging to His Majesty's enemies was not to be deemed legal or in any manner to transfer title.[23] This last was in retaliation for a similar enactment by France.

The finishing touches were given the system thus set up by an Order in Council of November 25, 1807, which listed the regulations His Majesty saw fit to provide for such neutral trade as was to be permitted under the Order of November 11.

1. All neutral vessels are permitted to lade in the United Kingdom any goods produced or manufactured in His Majesty's dominions or prize goods and carry them to any enemy colony in the West Indies or America not actually being blockaded, subject to the payment of duties.

2. All neutral vessels are permitted to lade any articles of foreign produce or manufacture lawfully imported into the United Kingdom and to convey them into the colonies above-mentioned provided His Majesty's license has previously been obtained.

21. *Idem.* 22. *Idem.*
23. *Ibid.*, p. 31.

3. All neutral vessels are permitted to lade any goods of native growth or manufacture or lawful import (save foreign sugar, coffee, wine, brandy, snuff, and cotton) except military and naval stores and convey them to any specified port, although it comes under the provisions of the Order, as long as it is not in a state of actual blockade.

4. All neutral vessels are permitted to lade and convey foreign sugar, coffee, wine, brandy, snuff, and cotton lawfully imported provided His Majesty's license be previously obtained for the exportation and conveyance thereof.

5. No neutral vessel is permitted to clear out of any port in the United Kingdom with any goods on board "which shall have imported the same into this kingdom, without having duly entered and landed the same in some port or place in this kingdom."

6. No vessel is permitted to clear out from any port in the United Kingdom to any place whatever with any goods, produce, or manufacture of any blockaded country without having duly entered and landed the same.

7. The provisions (5) and (6) above shall not apply to a cargo consisting wholly of grain or other products of the soil of the country of origin, except cotton, which are imported directly in an unmanufactured state to the United Kingdom in a vessel and from a port of the country of which they are the produce.[24]

The complexity and confusion of the two principal Orders is apparent even in summary. It was the head of a famous English commercial family, Maurice Baring, who said "I beg to disclaim any intention to expound the literal text; it seems purposely intended that no person shall profane it with his comprehension without paying two guineas for an opinion, with the additional benefit of being able to obtain one directly opposed to it for two more. What the motive can be for such studied obscurity . . . it is difficult to say, unless it be to surprise the Americans into a belief that they no longer speak English." [25] It is possible, however, to disentangle the main outlines, and the neutral position may be summarized as follows:

24. *Ibid.*, p. 271.

25. Alexander Baring, *An Inquiry into the Causes and Consequences of the Orders in Council* (London, 1808), p. 15*n*.

1. A neutral could carry the produce of an enemy colony to a port in its own country or to a British port but not directly to the port of another neutral or of a belligerent.

2. A neutral could carry the produce of an enemy colony except sugar, coffee, wine, brandy, snuff, and cotton to an enemy port provided the same were first entered and landed in some port of the United Kingdom.

3. A neutral could carry into the United Kingdom any enemy produce whatsoever.

4. A neutral could carry enemy produce to the ports of his own country, another neutral country, or the enemy only by first importing such goods into Great Britain or ports assimilated to her.

5. A neutral could carry goods of British produce or manufacture to any enemy port or colony.

6. A neutral could carry the produce of his own country and foreign produce in his possession from a port in his own country directly to an enemy colony.

7. A neutral could carry the produce of his own country and other neutral states, except sugar, coffee, wine, brandy, snuff, and cotton to the blockaded ports only by first importing them into ports under British control and, to enemy colonial ports, only if granted a British license.

8. A neutral could carry coffee, sugar, wine, brandy, snuff, and cotton, even if the produce of his own country, to a blockaded port only if such goods were first imported into England and a license obtained for their export.

The trade remaining to the neutrals under the British Orders may be further broken down into direct trade and indirect trade. The master of a neutral ship could carry direct:

1. the produce of an enemy colony to a port in his own country;

2. the produce of an enemy colony to a British port;

3. the produce of an enemy to a British port;

4. British produce to an enemy port or colony;

5. neutral produce from a port in his own country to an enemy colony;

6. neutral produce to a neutral port.

A neutral could carry indirectly, that is only by unlading in a British port and paying duty:

1. enemy produce to his own port;
2. enemy produce to other neutral ports;
3. enemy colonial produce to an enemy port;
4. enemy produce to enemy ports;
5. neutral produce to enemy ports.

In addition a British license was necessary before a neutral could carry:

1. foreign produce from the British Islands to enemy colonies;
2. foreign sugar, coffee, wine, brandy, snuff, and cotton to blockaded ports.

The scope of these Orders becomes even more impressive when it is remembered that practically every port in Europe could be classified as an enemy port or a port excluding British produce. Napoleon ruled, directly or indirectly, over France, Italy, and Holland. He was protector of the Confederation of the Rhine. In October Denmark allied herself to France in consequence of the British seizure of the Danish fleet. In December, 1807, French troops began to pour into Spain and soon another of Napoleon's brothers was to sit on the throne of that country. Of the countries that had retained their independence Sweden, Russia, Austria, and Prussia were pledged to exclude British goods.

The Milan Decree

Although subsequently modified, the November Order in Council was the crown of the British retaliatory edifice. The French structure was completed soon afterward with the Milan Decree of December 17, 1807, in reality little more than a clarification and extension of its predecessor of Berlin.

Britain, France complained, had denationalized the ships of every nation that submitted to her rules. The British Isles, therefore, were declared in a state of blockade. All ships submitting to British search were lawful prize. Any ship, whatever its nationality or cargo, sailing

from the ports of Britain, her colonies, or ports occupied by British troops would be considered good prize.[26] The provision regarding visit at an enemy port was merely a clarification of the existing confiscation clause in the Berlin Decree; the provision regarding search represented an altogether unfounded claim that neutrals could be expected to resist Britain not merely when she acted in an illegal fashion, but also when she exercised the belligerent right of visit and search.

After the issuance of the Milan Decree there were no major changes in the retaliatory systems of the two belligerents. Both sides introduced exceptions and administrative changes from time to time and, although these cast light both on the position of neutrals and on belligerent policy, they do not affect the main outlines of the system. It is clear that in retaliating neither belligerent made any effort to adopt a policy that would be the exact counter-part of the one introduced by its opponent. Quite the contrary was true. Each belligerent followed its own distinct line of action using the acts of the enemy only as a justification for the extension of its own measures. France followed a consistent policy of cutting off all neutral trade with Britain. Britain, on the other hand, made no attempt to cut off French trade completely, seeking rather to force British trade on France by insisting that there be no neutral trade with the French *except through Britain.* These objectives are apparent in all of the belligerent measures relating to commerce whether municipal regulations or decrees affecting rights established under international law.

Taken as a whole, in the period of its widest enforcement, the European retaliatory system made it impossible for the neutral to obey the regulations of one belligerent without becoming subject to the danger of confiscation by the other. Should a neutral carrying a cargo of goods produced in his own country have among his papers a French certificate of origin he could be condemned by the British. Without such a certificate, his ship and cargo might be confiscated by the French. If a neutral with a cargo for the Continent failed to touch at a British port he might be taken by the British; if he even allowed a party of British seamen to visit his ship, he stood a good chance of being taken by the French. The unhappy neutral shipper might hope that the protests of his Government would relieve his situation; mean-

26. Strahan, *op. cit.*, pp. 54, 55.

while, he might seek relief from the prize courts although he could have but little expectation of success.

Belligerent Justification of Retaliatory Measures

Both sides were open in their recognition of the fact that their Decrees and Orders would not normally be considered legal. Of the French Decrees of Berlin and Milan it was said that the Emperor would consider them "as violating the principles of eternal justice, if they were not the compelled consequence of the British orders in council . . ." [27] while of those Orders in Council, Sir William Scott declared, "I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory." [28]

Response to Prior Illegalities

Whether on the basis of natural law or of conventional law it was the doctrine of both powers that the illegal conduct of one belligerent legalized similar conduct on the part of its opponent. The Berlin Decree arguing from the standpoint of natural law, stated that "England does not acknowledge the laws generally observed by all civilized nations . . . it is a natural right to oppose an enemy with the same weapons he employs, and to combat him by the same means which he employs against others, especially when that enemy disclaims all ideas of justice, and all the liberal sentiments which have resulted from the civilization of mankind." [29] Sir William Scott, upholding a more positivist point of view, argued before the House of Commons that since the Law of Nations is by nature conventional it is binding no longer than it is adhered to by all concerned. When one party has departed from it, the other is left to the guidance of natural justice which authorizes retaliation as an essential part of self-defense.[30]

Both sides advanced the plea that if a nation adopts illegal methods its enemy is powerless unless, as the French put it, one turns "against her the arms which she makes use of herself [for] the proceedings of England toward all Governments are so contrary to the law of nations, and all the rules constantly observed even among enemies, that no re-

27. *Foreign Relations of the United States*, vol. III, p. 380.
28. The *Fox, ibid.*, p. 418.
29. Strahan, *op. cit.*, pp. 52, 53.
30. Hansard, *Parliamentary Debates*, vol. 10, p. 1066.

course against this Power is any longer to be found in the ordinary means of repression. . . ." [31] Similarly Britain argued ". . . When an enemy arises who declares to all the world that he will trample upon the law of nations, and hold at nought all the privileges of neutral nations when they do not suit his belligerent interests . . . it is evident that if those Powers with which he is at war should continue to hold themselves bound to rules and obligations of which he will not acknowledge the force, they cannot carry on the contest on equal terms." [32] Indeed, the sovereign might feel himself "bound by a due regard to the just defense of the rights and interests of his people, not to suffer such measures to be taken by the enemy, without taking some steps, on his part, to restrain this violence, and to retort upon them the evils of their own injustice." [33]

Inadequacy of Neutral Action

The right of self-defense against the prior illegality of the opponent might conceivably be exercised without more interference with neutrals than could be regarded as an incidental consequence of retaliatory acts, regrettable but unavoidable. For the most part, however, belligerent arguments—and belligerent acts—did not remain within this relatively conservative treatment of neutral rights. Rather they claimed that neutral acquiescence in the acts complained of was the prime cause of their continuation. Hence by grounding their arguments on the basis of neutral responsibility, the belligerents soon reached a point where, with clear legal conscience, they were able to deny the neutrals any rights whatsoever.

Should a neutral complain that France had violated its rights, France had only to reply that Britain had been suffered to do the same and what had been allowed to Britain must be allowed to France. "And if some Powers tolerate the infractions committed on their independence, could they have the right to require that France alone restrain herself within limits which her enemy has everywhere overleaped?" [34] Nor was Britain behindhand in charging that the neutral powers had

31. *Foreign Relations of the United States*, vol. III, p. 249.

32. Spenser Perceval's "Suggestions to the Cabinet," Oct. 12, 1807, cited in Henry Adams, *History of the United States during the Administrations of Jefferson and Madison* (New York, 1890), vol. IV, p. 84.

33. Order in Council of Jan. 7, 1807, *Foreign Relations of the United States*, vol. III, p. 5.

lost their rights, even those acquired by treaty, through acquiescence in the Berlin Decree. "The French government in adopting a measure at once so violent in itself and of such injustice with respect to the consequences which must necessarily have been expected to result from it, committed a manifest act of hostile aggression (though immediately directed against Great Britain) against the rights of every state not engaged in this war, which if not resisted on their part, must unavoidably deprive them of the privileges of a fair neutrality, and must suspend the operation of treaties formed for the protection of neutral rights, thus fundamentally violated in their first and most essential principles." [35]

It is apparent from these statements that no belligerent was satisfied with a mere neutral protest against the acts of its enemy. An ineffectual protest left the unfortunate neutral with neither satisfaction from the one belligerent nor recognition from the other that by so protesting the neutral had done all that could be required of it in preserving its position against belligerent encroachment. It would seem, indeed, that the only neutral action with which a belligerent could be satisfied was one that obtained a complete repeal of the offending decrees. "Whatever might be the doubts upon it when the decree of France first issued, and before it was known to what extent neutrals would resist or acquiesce in it; since these neutrals have acquiesced in it, or at least have not resisted or resented it to the extent of obtaining a formal recall of the decree and an open renunciation of the principle which dictated it, nor the abandonment of the practices which flow from it,—they by their acquiescence and submission have given to Great Britain a right to expect from them (when her interests require the exertion of measures of corresponding efficacy) a forbearance similar to that which they have shown toward her enemy." [36]

France went so far as to imply that only by declaring war against Britain could neutrals avoid complicity in British crimes. "In the situation on (*sic*) which England has placed the continent, especially since her decrees of the 11th November, His Majesty has no doubt of a declaration of war against her by the United States. . . . War exists then, in fact, between England and the United States . . . His Maj-

35. Hansard, *Parliamentary Debates*, vol. 10, p. 403.
36. Adams, *op. cit.*, p. 85.

esty, ready to consider the United States as associated with the cause of all the Powers who have to defend themselves against England, has not taken any definite measures toward the American vessels which may have been taken into our ports; he has ordered that they should remain sequestered until a decision may be had thereon, according to the disposition which shall have been expressed by the Government of the United States." [37]

Until neutrals satisfied such exaggerated claims as these, belligerents felt justified in meeting their protests with nothing more than the retort that neutrals had no right to complain. Did the United States object to French treatment of American merchant ships? "While the United States allow that their vessels may be visited by England that she may drag them into her ports and turn them from their destination; while they do not oblige England to respect their flag and the merchandise which it covers . . . they bring themselves by that tolerance toward England, to allow also the application of the measures of reprisals which France is obliged to employ against her." [38] Did neutrals demand their hard won right to carry innocent goods to open ports? "Neutral nations cannot, indeed, expect the king should suffer the commerce of his enemies to be carried on through them, whilst they submit to the prohibition which France has declared against the commerce of His Majesty's subjects." [39] The United States may trade with France in accustomed fashion only if its government secures the repeal of the Berlin and Milan decrees. Otherwise, America is an accomplice of France against England. "We complain that America does not resist the regulations of the Berlin and Milan decrees, and object to permitting the French to trade with her during their continuance against the commerce of England. . . . If America wishes to trade with France . . . we expect she should exact of France to trade with her, as she has a right to demand, in her quality of neutral; but if she does not choose to exercise this right, all that we can ask is, that she abstain from lending her assistance to the trade of France, and not allow her commerce to be a medium of undermining the resources of Great Britain." [40]

37. *Foreign Relations of the United States*, vol. III, p. 249.
38. *Ibid.*, pp. 247, 248.
39. *Ibid.*, p. 158.
40. *Ibid.*, p. 451.

Looking beneath the accumulated verbiage, it is apparent that the doctrine of retaliation, so variously employed during the Napoleonic wars, rested on two assumptions. First, that the employment by one belligerent of an illegal method of warfare releases its opponent from any obligation to refrain from corresponding measures or, more positively, gives it the right to employ similar measures without acting illegally. Second, that it is a neutral duty *effectively* to protest against violations of neutral rights, that if this duty be not performed, it is the right of the belligerent to protect itself against the consequences of the enemy's violation of neutral rights by adopting similar measures, while the neutral, on its side, loses the right to protest against the acts of the retaliating state.

Logically, the first assumption, if acted upon by both sides, leads to the progressive destruction of the laws of war; the second, to the destruction of the rights of neutrals. This statement of what may be expected as the outcome of such policies must be modified by the fact that, in each case, the avowed purpose of the retaliatory act is not so much to defeat the enemy as to force him to withdraw his illegal measures. The regulations of the Berlin Decree were to be "considered as forming a fundamental law of the empire, until England shall acknowledge that the right of war is the same by land as by sea—that it does not extend to private property, of any kind whatever, or to the persons of individuals unconnected with the profession of arms, and that the right of blockade is limited to fortified places, actually invested by a sufficient force." [41] As for the Orders in Council, "whenever the repeal of the French decrees shall have actually taken effect and the commerce of neutral nations shall have been restored to the condition in which it stood previously to the promulgation of these decrees, His Majesty will feel the highest satisfaction in relinquishing a system which the conduct of the enemy compelled him to adopt." [42] Conceivably, then, a policy of retaliation might have the effect, wholly desirable from the point of view of international law, of forcing the abandonment of illegal acts. Whether or not this result is to be expected from any policy of retaliation will depend not only upon the strength of the power pursuing it, but also upon the measures adopted and the actual motives behind the particular method employed.

41. Strahan, *op. cit.*, p. 53.
42. *Foreign Relations of the United States*, vol. III, p. 366.

Retaliatory Decrees in the Courts

The neutral shipper soon found that he could expect no aid from the prize courts of the belligerents for both French and British judges refused to admit that the enactments of their respective sovereigns could be contrary to international law. This being the case, the French Conseil des Prises was bound to render its decisions in accord with the provisions of the Berlin and Milan Decrees while, on the other hand, the High Court of Admiralty owed the same deference to the British Orders. Due to the difference between Continental and Anglo-American practice in the rendering of judicial decisions, it is only in the British cases that one finds detailed analysis and justification of the retaliatory decrees from the point of view of international law. The French courts, in contrast, were content to enforce the government's decrees without questioning their legality and resorted to interpretation only when some provision of the law required clarification.[43]

French Decisions

The attitude of the French court was made clear in the important *Horizon* case decided in September, 1807. The *Horizon* was an American vessel which had been shipwrecked off the coast of France and seized for violation of the Berlin Decree. In accordance with the decree the Court condemned that part of the cargo which was of neutral ownership but British manufacture although it was admitted by the Court that the neutrality of both ship and cargo was sufficiently established. This decision was avowedly based on Napoleon's interpretation of the Berlin Decree as delivered to the Prize Court on September 18, 1807. As a consequence of the obscurity of the Decree it had been necessary to ask the Emperor "May vessels of war, by virtue of the Imperial Decree of the 21st November last, seize on board neutral vessels, either English property, or even all the merchandise proceeding from English manufactures or territory?" In reply, the Attorney General was informed "His Majesty has intimated that, as he did not think

43. For reports on cases see Pistoye et Duverdy, *op. cit.*, vol. I, *passim.* Most of these are concerned with the treatment of ships that had taken on cargo without knowledge of the decrees and similar routine questions. An interesting case is that of *The Brutus v. La Dame Ernouf* in which it was declared by the Conseil d'État that cargoes laden in any uncivilized area where the British had established a trading post would be regarded as of enemy origin, any other course being conducive to wholesale fraud.

proper to express any exception to his decree, there is no ground for making any in its execution, in relation to any whomsoever." [44] This was clearly a signal that the Decree was to be interpreted as broadly as possible.

The Court's statement as to the reasons for its decision rested entirely on the "intention of the sovereign" as expressed in the letter of the Minister of Justice. Since this was the case, no objection could be brought on the grounds that the *Horizon* was taken and brought to trial prior to His Majesty's interpretation of the Decree which was not the "interpretation of a doubtful point, but . . . a declaration of anterior and positive distinction." Whatever opinions may have been pronounced prior to Napoleon's declaration, the Court was "rigid in its duty to pronounce in conformity to the decree of the 21st of November, and the declaration which followed it." [45]

From now on, it could be expected that whatever decisions Napoleon might make concerning the Decrees, his interpretation would be regarded by the Conseil des Prises as completely binding upon it. As far as neutrals were concerned, international law existed to protect them only in those areas where the Emperor had not spoken.

The reasons given for the condemnation of American ships between April, 1808, and May, 1809, were summarized in a report to the Government of the United States.[46] In eighteen cases decision to condemn rested partly on the fact that the ships concerned had touched at an English port; in four cases, on the grounds that they had been carried into British ports by British ships. The fact that they had been visited by a British ship entered into the decision to condemn eleven American vessels. Three were condemned for having a British destination; three for being, in reality, British property. In four cases possession of a British license was regarded as a reason for condemnation; in six cases lack of a certificate of origin; while six ships were condemned for carrying false papers or for other frauds and attempted frauds.[47]

44. *Foreign Relations of the United States*, vol. III, p. 25.
45. *Ibid.*, pp. 245, 256.
46. *Ibid.*, pp. 344–346.
47. Americans whose property had been seized under the Berlin and Milan Decrees ultimately received some compensation as a result of the Franco-American treaty of July 4, 1831, Article I of which read: "The French Government, in order to liberate itself completely from all the reclamations preferred

British Decisions

The French decision in the case of the *Horizon* was the first to be handed down under the Berlin Decree and the condemnations which followed while the decrees remained in force derived directly from its logic. The British procedure was directly opposite to the French. A full judicial exposition of the Orders in Council did not come in Britain until the Courts had been operating under the Orders for four years. Then, in the case of the *Fox*,[48] decided on May 30, 1811, Sir William Scott gathered the fruits of four years of judicial reasoning into an elaborate statement of the Court's position with regard to the Orders.

The *Fox*, an American vessel, out of Boston for Cherbourg, was taken by the British on November 15, 1810, for violation of the Orders in Council. The neutral claimants contended that the ship and cargo were not confiscable because the Orders, being founded on measures which the enemy had retracted, were extinct. The decision to condemn this vessel led Scott to an analysis of the legal nature, the interpretation, and the duration of the Orders.

Scott, like his French colleagues, found the justification of the retaliatory orders in the fact that they were an expression of sovereignty. Prize Courts, he admitted, were bound to apply the law of nations to

against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations or destructions of their vessels, cargoes, or other property, engages to pay a sum of twenty five millions of francs to the government of the United States who shall distribute it among those entitled in the manner and according to the rules which it shall determine." Pursuant to the terms of the treaty, the United States, by act of Congress, established a commission to examine all claims presented and to grant awards to be paid from the funds received from France. According to one of its members, John K. Kane, the Commission believed that "The celebrated decrees of Berlin and Milan were in most of their provisions avowed departures from the general law of nations. . . . The Berlin decree was held by the commissioners to present no justification for the acts of France, so far 1. As it interdicted to Americans the trade with England in goods not contraband and to ports not actually blockaded; 2. As it interdicted to them the trade in English manufactured goods; 3. As it condemned American ships for carrying British property; and 4. As it condemned American property because found on board British vessels, or for having been under the protection of British convoy." John Bassett Moore, *International Adjudications*, Modern Series (New York, 1933), vol. V. The holdings of the Commissioners, of course, were of purely domestic effect.

48. *Foreign Relations of the United States*, vol. III, p. 417.

the subjects of other countries. But the Court is also bound to apply the orders and instructions of the king in council. These two obligations, however, are not inconsistent with each other since it cannot be presumed without "extreme indecency" that an Order in Council would contradict the principles of international law. Unquestionably the Orders would not be just if they were not retaliatory, but since the Crown has declared them to be retaliatory their justice cannot be questioned.

The claimants had argued, however, that the Orders had actually ceased to be retaliatory when the Decrees against which they had been directed were revoked. But, held Scott, in the question of revocation, the only proper evidence for the Court to receive is the declaration of the State itself that, in consequence of such action on the part of the enemy, it has withdrawn its retaliatory orders. Until such official notification the Court is bound to presume that the necessity for the retaliatory orders still exists since "it cannot, without extreme indecency, suppose that they would continue a moment longer than the necessity which produced them."

Any presumption as to the illegality of the Orders as a whole, their separate parts, and their continuance was, it seemed, indecent. The court if it wished to retain its decency would then have to confine itself to questions of fact. Doubts as to what course of action would be legal could arise only when the intentions of the Government had not been clearly expressed. This latter question arose in one case only, that of the *Lucy*. A British retaliatory Order had provided that title did not pass to a neutral who bought a ship from a belligerent. This case concerned the application of that Order to the neutral re-purchase of a vessel condemned as prize. Scott interpreted the Order to intend that retaliation should be exact. Therefore, he ruled "it did appear to me to be extremely necessary not to carry the rule one inch beyond the purpose for which it was adopted; and that if it could be shewn that the enemy did not follow up their ordinances to the full extent, the policy of this country would suggest a corresponding relation. . . . On looking into the French Code de Prizes, I have reason to think that it was not a part of French policy to restrict the sale of enemy's prize vessels . . . and as I think it would be improper to carry the

restriction further than the enemy has done . . . I shall restore, giving them their expenses." [49]

Unfortunately for the neutrals, however, it was quite apparent in the major Orders that the Government had no intention of following a policy of exact retaliation or of limiting their own actions by a consideration of French policy. It was clear from the *Fox* that any rule laid down in the name of retaliation would be followed by the Court without hesitation, and the question as to whether the retaliatory measures of the Government were considered to be subject to judicial limitation, in the light of the Court's reliance on the intention of the Sovereign, must be answered in the negative.

That there were no legal limits on the exercise of retaliation was made quite clear by Sir William Scott in the *Fox* and in other cases as well. It was charged that British subjects were permitted to trade with France and that a blockade that excluded subjects of all other countries while making exceptions for the subjects of imposing states was null and void. This argument, said Scott, in the *Fox*, was nullified by the peculiar nature of the blockade in question which was not an original, independent measure subject to the rules governing blockade but a reflex measure compelled by an enemy act and therefore subject to other conditions arising out of its distinctive character. "France declared that the subjects of other states should have no access to England; England, on that account declared that the subjects of other states should have no access to France. So far this retaliatory blockade . . . is coextensive with the principle: neutrals are prohibited to trade with France, because they are prohibited by France from trading with England. England acquires the right which it would not otherwise possess, to prohibit that intercourse, by virtue of the act of France. Having so acquired it, it exercises it to its full extent, with entire competence of legal authority; and having so done, it is not for other countries to inquire how far this country may be able to relieve itself further from the aggressions of that enemy. The case is settled between them and itself by the principle on which intercourse is prohibited. If the convenience of this country, before this prohibition

49. Decided by Scott in July, 1809. Thomas Edwards, *Reports of Cases Argued and Determined in the High Court of Admiralty* (New York, 1815), p. 122.

required some occasional intercourse with the enemy, no justice that is due to other countries requires that such an intercourse should be suspended on account of any prohibition imposed upon them on a ground so totally unconnected with the ordinary principles of a common measure of blockade from which this is distinguished by its retaliatory character." [50]

A similar principle is laid down with regard to the license trade in the *Success*. Here Scott goes to great lengths to prove that it "would be a shameful abuse of a belligerent right . . . to convert the blockade into a mere instrument of commercial monopoly . . ." by allowing British subjects to trade at ports from which neutrals are excluded. Actually it was undeniable that British subjects had traded at such ports under government license and so Scott was under the necessity of reversing his argument. "Such licenses have been occasionally issued in cases of regular and ordinary blockades and may perhaps have been granted with greater liberality under that imposed by the Order in Council which is of a peculiar character and necessarily requires a greater degree of modification." [51]

At the same time, enemy modifications were regarded with a far from lenient eye. With respect to French modifications, Scott declared that the repeal of retaliatory decrees "must be absolute because if partial it may be still more injurious to the just rights of the other belligerent than the general prohibition. It can never be admitted that in a war of general prohibitions between two belligerent states, one shall have a right to carve out its own exemptions for its own particular convenience, and call upon the other to respect them." [52]

The principles on which the British Court based its decisions under the Orders in Council may be summarized as follows: the legality of the retaliatory orders themselves cannot be questioned because the acts of the sovereign are binding on the court and cannot be presumed to contradict the principles of international law; on the same grounds the legality of any modifications in the decrees that the sovereign may

50. *Foreign Relations of the United States*, vol. III, p. 419.

51. Decided by Scott in January, 1812. E. S. Roscoe, *Reports of Prize Cases Determined in the High Court of Admiralty* (London, 1905), vol. II, p. 140.

52. *The Snipe*, Edwards, *op. cit.*, p. 381; cf. also *The Sansom*, Christopher Robinson, *Reports of Cases Argued and Determined in the High Courts of Admiralty* (London, 1808), vol. VI, p. 410.

make cannot be questioned; the retaliatory acts must be presumed to be legal as long as the king chooses to retain them. Acting on these principles, the Court gave the Orders their full effect, even proceeding to the absurd length of deciding, under the November Order, that a ship of a country not at war with Britain, going from one port to another in its own country, could be condemned for violating the blockade.[53]

Neutral Arguments Against the Doctrine and Practice of Retaliation

While subjects of neutral states were vainly seeking relief from the retaliatory decrees in belligerent prize courts, neutral governments were addressing their complaints to the retaliating states with little more success. Neutral objections to the doctrine and practice of retaliation rested on three arguments: that retaliation could not legally operate against neutral rights; that the retaliatory decrees were premature; that neutral duties had been fulfilled and that, therefore, retaliatory measures could not legally operate against neutrals.

The most vigorous protest against the very principle of retaliation came from Denmark. The Court of Denmark regarded the right of retaliation upon which the Orders in Council were based "as absolutely inadmissible in its principle and in its consequences. To establish this right, it would be necessary to begin by destroying the first notions of general and public law. It must be intended to lay down as a principle, that every power has a right arbitrarily to renounce engagements, and to derogate from solemn stipulations with another power, for no other reason than that its relations with a third power have changed their character. It must be intended to insist that the privileges, interests, and property of a neutral nation, are at the disposition of every other power . . . as soon as the course of events, or the inclinations of that power should engage her in a war entirely foreign to the neutral nation." [54]

The United States weakened its position by directing its protests

53. *The Speculation*, Edwards, *op. cit.*, p. 184.
54. Hansard, vol. 10, p. 399.

against the nature of the measures employed rather than against the principle itself.[55] The American Government seemed prepared to admit that retaliation could operate legally through a neutral as long as the retaliatory measure was in proportion to the injury sustained and was "preceded by an unreasonable failure of the neutral party, in some mode or other, to put an end to the inequality wrongfully produced." [56] The American argument was further weakened by the omission in later protests of the second argument that there be some precedent neutral fault before the adoption of retaliatory measures affecting neutral rights. "Retaliation is a specific or equivalent return of injury for injury received; and where it is to operate through the interests of a third party, having no voluntary participation in the injury received, the return . . . ought to be inflicted with the most forbearing hand. . . . As the right to retaliate results merely from the wrong suffered, it cannot, in the nature of things, extend beyond the extent of the suffering. . . ." [57] In a later note in which neutral responsibility was once again, although inconspicuously, brought forward, Monroe demanded "Is the deadly blow of the orders in council against one-half of our commerce a return of like for like to the empty threat in the French decrees against the other half? It may be a vindictive hostility as far as its effect falls on the enemy. But when falling on a neutral, who, on no pretext, can be liable for more than the measure of injury received through such a neutral, it would not be a retaliation but a positive wrong." [58]

The weakness of the American argument on this point lay in the fact that for the statement of a neutral right to freedom from the effects of belligerent retaliation, a right that was clearly and unequivocally asserted in 1915, it substituted a demand that retaliatory measures should be in proportion to the injury received through the neutral. A demand of such indeterminate character could not fail to be used by the belligerent to confuse the issues involved, since neither bellig-

55. For the background of the American conception of neutral obligations see C. M. Thomas, *American Neutrality in 1793* (New York, 1931), *passim*, and C. S. Hyneman, *The First American Neutrality* (Urbana, 1934), especially pp. 48–51.

56. *Foreign Relations of the United States*, vol. III, p. 159.

57. *Ibid.*, p. 211.

58. *Ibid.*, p. 439. See also p. 261.

erent was at a loss to prove that its measures were exactly of the character described as legal by the neutral itself.

A second neutral argument against the retaliatory acts was that the belligerents had acted prematurely. In opposing the British Orders the United States took advantage of the obscurity of the Berlin Decree to argue that at the time when the British Orders were issued, it was not yet clear whether the French would interpret their Decree as a municipal ordinance or as one applying to the high seas as well.[59] Furthermore, the January Order was "promulgated and carried into effect a few weeks only after the Berlin decree had made its appearance, when the American Government could not possibly know that such a decree existed, when there had been no attempt to enforce it, and when it had become probable that it would not be enforced at all to the prejudice of neutral rights. . . ." [60] By premature retaliation, both France and Great Britain had failed in their duty to allow neutrals "a reasonable time for choosing between due measures against the prior wrong and an acquiescence in both . . ." [61] and had interposed unseasonably between the injuring and the injured party.[62] "What would be the situation of neutral Powers," asked Madison, "if the first blow by one belligerent against another was to leave them no choice but between the retaliatory vengeance of the latter, and an instant declaration of war against the former? Reason revolts against this as the sole alternative." [63]

The doctrine of neutral acquiescence being a favorite among the belligerents, the neutrals were constrained repeatedly to deny that they had in any way failed to perform their neutral duties. That there was a wide gap between what the neutrals conceived to be their duty and what the belligerents demanded was recognized and resented by the neutrals. "It is true that to the nominal proclamation blockades of England the United States has opposed only spirited and repeated remonstrances and that these had not always been successful. But the measures which a neutral nation may be supposed bound to take against the infractions of its neutrality, must always bear a certain pro-

59. *Ibid.*, pp. 159 and 234.
60. *Ibid.*, p. 234. See also p. 260.
61. *Ibid.*, p. 249.
62. *Ibid.*, p. 159.
63. *Ibid.*, p. 211.

portion to the extent and nature of the injury received, and to the means of opposition. It cannot certainly be pretended that a hasty resort to war should, in every instance, have become the duty of America. . . ." [64] As for the fulfillment of actual duties, the United States claimed that at no time had it acquiesced in violations of its neutral rights, injurious to any belligerent,[65] that, on the contrary, its protests had been prompt and unceasing,[66] and that, in no instance, had there been a departure from the strictest neutrality.[67]

Neutral Efforts to Bring About Repeal of the Retaliatory Acts

Legal arguments were of little interest to the warring governments and neutrals were quickly reduced to a position where, had it not been for the extensive practice of fraud, their trade would have been cut off almost entirely. The fruits of successful evasion of the decrees were rich but for those who failed, there were severe losses in shipping and cargo. After the passage of the Order in Council of November 1807, the British condemned 389 American vessels, while during the period in which the Milan Decree was in effect, 307 American ships were taken by France and her allies.[68]

The neutral cause had little strength to support it for few countries escaped involvement in the prolonged hostilities and, when the United States went to war with Great Britain in 1812, it could be said with truth that there were no more neutrals. The United States, however, was able to remain neutral longer than any of the European states, and, until 1812, she conducted a ceaseless though somewhat ineffectual campaign against the retaliatory measures of France and Britain. Young and weak as the Republic was, in commercial strength it stood second only to Britain. Consequently, it was to be expected that, its legal arguments being of no avail, its military force being practically nonexistent, the weapon that would be used in the attempt to regain neutral rights would be the weapon of commercial power.

Not only did America's external circumstances favor the use of

64. *Ibid.*, pp. 259, 260.
65. *Ibid.*, p. 249.
66. *Ibid.*, p. 211.
67. *Ibid.*, p. 428.
68. *Ibid.*, p. 534.

commercial measures to secure political rights, but also Jefferson's own theories of peaceful coercion led him to regard the restraint of commerce as a means first of protecting the United States but perhaps also of forcing the nations of Europe to end their incessant war. The Embargo Act, was not purely an act of reprisal against the belligerents, as was later claimed by Americans and by British merchants hostile to the Orders in Council. It was in addition the expression of Jefferson's philosophy, deep-seated and long held, and, as such, would probably have gone into effect in some form without the additional provocation of the retaliatory decrees.[69] It is with its effects on the retaliatory decrees, however, that this paper is concerned.

The Embargo Act became law on December 22, 1807. By its provisions all ships of American registry in the United States were forbidden to depart from the ports in which they were then lying except upon giving bond that their cargoes would be landed in another part of the country.[70] The French response was to order on April 17, 1808, that all American vessels then in the ports of France or coming into them thereafter were to be seized "because no vessel of the United States can now navigate the seas without infracting a law of the said States, and thus furnishing a presumption that they do so on British account, or in British connexion." [71]

The British also expressed a desire to enforce the Americans' regulations for them. Great Britain would repeal the Orders in Council, Canning said, on condition that the Embargo be withdrawn as it operated against Britain but retained as against France and that "Great Britain for the purpose of securing the operation of the Embargo, and of the *bond fide* (*sic*) intention of America to prevent her citizens from trading with France, and the powers adopting and acting under the French decrees, is to be considered as being at liberty to capture all such American vessels as may be found attempting to trade with the ports of any of those powers; without which security for the observance of the Embargo, the raising it nominally with respect to Great Britain alone, would in fact raise it with respect to all the world." [72]

69. Louis M. Sears, *Jefferson and the Embargo* (Durham, 1927), *passim.*

70. Francis Déak and Philip C. Jessup, *A Collection of Neutrality Laws, Regulations and Treaties* (Washington, D.C., 1939), vol. II, p. 1161.

71. *Foreign Relations of the United States,* vol. III, p. 291.

72. Hansard, vol. 17, pp. cxxiv, cxxv.

The Embargo seemed to American shippers more of a penalty on them than on France and England and on March 1, 1809, the Non-Intercourse Act was substituted for it. This act contained four important provisions:

1. The public ships of France and Great Britain could not enter the ports of the United States.
2. After May 20, 1809, merchant ships of France and England could not enter the ports of the United States under penalty of forfeiture.
3. There was to be no importation from France or Great Britain.
4. The provisions of this act might be suspended to favor either nation which should revoke or modify its orders or decrees so as to cease to violate neutral rights.[73]

This Act, like its predecessors, failed to cause either of the belligerents to modify its practices in a way favorable to the United States. In point of fact it produced the contrary results. Any American measure, it seemed, could serve France as a pretext for the seizure of American ships and the consequent enrichment of the French treasury. On February 14, 1810, General Armstrong, the American Minister, was informed that the Emperor "considered himself bound to order reprisals on American vessels not only in his territory, but likewise in the countries which are under his influence. In the ports of Holland, of Spain, of Italy, and of Naples, American vessels have been seized because the Americans have seized French vessels." [74] This order was subsequently embodied in the Rambouillet Decree, dated March 23, 1810, but not published until mid-May, which provided that all American ships that had entered French ports since May 20, 1809, or that should enter in future were to be confiscated and sold.[75] The inappropriateness of this act as a measure of reprisal is apparent. The United States had ordered that after two months' notice any French merchant ship entering her ports was to be confiscated. France, after more than twelve months of silence, had replied that all the ships that had entered French ports in complete innocence and without warning were to be

73. Déak and Jessup, *op. cit.*, vol. II, p. 1161.
74. *Foreign Relations of the United States*, vol. III, p. 380.
75. *Ibid.*, p. 384.

seized. As a revenue measure, however, the Rambouillet Decree was eminently successful. Napoleon himself estimated the value of the cargoes seized as $2,000,000 at Antwerp, $2,400,000 in Holland, and $1,600,000 in Spain. In addition the American consul at Paris reported to General Armstrong that between April, 1809, and April, 1810, fifty-one American ships were seized in the ports of France, forty-four in Spain, twenty-eight in Naples, and eleven in Holland.[76]

On May 1, 1810, the Non-Intercourse Act expired. Yet another attempt was made to bargain with the belligerents, this time directed exclusively to that end. It was provided that in case either Great Britain or France should, before March 3, 1811, revoke its edicts in such a way that they would no longer violate the neutral commerce of the United States, the President was to proclaim this fact and if the other nation did not, within three months of the proclamation, take similar action, the Non-Intercourse Act was to be renewed against that nation.[77]

At last the American efforts seemed to be producing results. On August 5, 1810, the Duc de Cadore wrote to General Armstrong: "I am authorized to declare to you, sir, that the decrees of Berlin and Milan are revoked, and that after the lst of November they will cease to have effect; it being understood that, in consequence of the declaration, the English shall revoke their orders in council, and renounce the new principle of blockade, which they have wished to establish; or that the United States, conformably to the act you have just communicated, shall cause their rights to be respected by the English." [78] This was supplemented by a suspension of the Rambouillet Decree until November 1.[79] The United States was warned, however, that any repeal of the Berlin and Milan decrees as affecting America could not be interpreted as modifying "the system of exclusion adopted by all Europe against the products of the soil or of the manufacture of England. . . ." [80]

The British, upon being informed of these developments, responded non-committally. In answer to the American minister's query, Lord Wellesley, the Foreign Secretary, wrote, "I am commanded by His

76. Adams, *op. cit.*, vol. V.
77. Déak and Jessup, *op. cit.*, vol. II, p. 1170.
78. *Foreign Relations of the United States*, vol. III, p. 387.
79. *Ibid.*, p. 388.
80. *Ibid.*, p. 500.

Majesty . . . to assure you that whenever the repeal of the French decrees shall have actually taken effect, and the commerce of neutral nations shall have been restored to the condition in which it stood previously to the promulgation of those decrees, His Majesty will feel the highest satisfaction in relinquishing a system which the conduct of the enemy compelled him to adopt." [81]

What were the practical effects of Cadore's letter? As far as France was concerned, until November 1 the Berlin and Milan Decrees were to be enforced against American ships as before. Further steps would depend upon American action. As for Britain, the ambiguity of the "it being understood" clause in the Cadore letter led to incessant correspondence with the British—as fruitless as that which had preceded the French step over the meaning and effects of Napoleon's statements.

On November 2, 1810, Madison proclaimed the discontinuance of all commercial restrictions on France.[82] The French responded to this step somewhat equivocally since no positive action had been taken against Britain. All vessels already captured and those which were brought before the Conseil des Prises in future were not to be judged according to the provisions of the Decrees. Instead, they were to be held until February 2, 1811, "the period at which the United States having fulfilled the engagement to cause their rights to be respected, the said captures shall be declared null by the council, and the American vessels restored, together with their cargoes, to the proprietors." [83]

In March, 1811, the Non-Intercourse Act was renewed against Great Britain. This fact was not given official recognition by the French, however, until April, 1812, when it was accepted by the Saint Cloud decree as "an act of resistance to the arbitrary pretensions consecrated by the British orders in council, and a formal refusal to adhere to a system invading the independence of neutral Powers and their flag. . . ." As a result, the Decrees were "definitively and to date from 1st November last, considered as not existing in regard to American vessels." [84]

The Decree of Saint Cloud, issued in April, 1812, (although dated April, 1811,) was of little use in 1811. Until April, 1812, in the absence of anything more definite, America was forced to depend on the state-

81. *Ibid.*, p. 366.
82. *Ibid.*, p. 392.
83. *Ibid.*, p. 393.
84. *Ibid.*, p. 393.

ments of subordinates and to look to the actual practice of France for verification of the repeal of the Decrees. In the months following the American action against Britain, the situation seemed highly favorable. On July 5, 1811, Russell, the American chargé at Paris, reported that the French had released the *Grace Ann Greene* and the *New Orleans Packet* which, having been boarded by the British, were good prize under the Decrees. A few days later he announced the release of three more American ships.[85] On January 28, 1812, Barlow, the recently appointed American minister, notified the Secretary of State of the release of the *Acastus* under similar circumstances.[86] And on January 29, 1812, Barlow wrote to Russell, "since my residence here, several American vessels with cargoes have arrived and been admitted in the ports of France, after having touched in England, the fact being declared; and there is no instance within that period of a vessel, in either of the cases of the Berlin and Milan decrees being detained or molested by the French Government." [87]

Six months later, although by this time the Saint Cloud decree had actually been issued, things were not so bright and Madison reported to Congress that "since the revocation of her [the French] decrees, as they violated the neutral rights of the United States, her Government has authorized illegal captures by its privateers and public ships; and that other outrages have been practised on our vessels and our citizens." [88]

Meanwhile the dispute with England was continuing on familiar lines, Cadore's reference to renunciation of "new principles of blockade" by the British providing the latter with still another subject for futile and endless diplomatic correspondence. On December 29, 1810, Lord Wellesley wrote to Pinkney that Cadore's letter did not "contain such a notification of the repeal of the French decrees of Berlin and Milan as could justify His Majesty's Government in repealing the British orders in council. . . ." If all that was required was the repeal of the Orders in Council for the purpose of securing the repeal of the French decrees, Great Britain would be agreeable. But Great Britain was also required to renounce the principle of blockade of commercial unfortified towns which France alleged to be new but which in

85. *Ibid.*, p. 447.
86. *Ibid.*, p. 518.
87. *Ibid.*, p. 425.
88. *Ibid.*, p. 407.

reality was "ancient and established by the laws of maritime war." [89] To Pinkney's protests that American blockade principles did not demand recognition of the French claims,[90] Wellesley could only reply that it was plain from the Cadore letter that if Great Britain did not submit to French blockade principles, America would be required to enforce them.[91]

The blockade argument was ostensibly weak and somewhat artificial. But the British did not lack for a much stronger argument which, given the shifting and evasive nature of Napoleon's policies, had at least a respectable basis in fact. How can you prove, they demanded, that Napoleon has actually repealed the offensive decrees? The British complained that they were unable "to obtain any authentic intelligence of the actual repeal of the French decrees . . . or of the restoration of the commerce of neutral nations to the condition in which it stood previously to the promulgation of those decrees." [92] In response to the demand that America show that repeal had had some practical effect, Pinkney wrote: "here your lordship must suffer me to remind you that the orders of England in 1807, did not wait for the practical effect of the *Berlin* decree, nor linger till the obscurity, in which the meaning of that decree was supposed to be involved, should be cleared away by time or explanation. They came promptly upon the decree itself, while it was still not only ambiguous but inoperative, and raised upon an idle prohibition, and a yet more idle declaration, which France had not yet attempted to enforce, and was notoriously incapable of enforcing, a vast scheme of oppression upon the seas, more destructive of all the acknowledged rights of peaceful states than history can parallel." [93]

The point was well taken but Britain was unlikely to be moved by accounts of her own past conduct however frankly and forcefully put. So Monroe sought once more to obtain some specific statement from Britain on the conditions under which she would repeal her orders. His request attempted to bring the British to commit themselves to a definition "of the precise extent in which the repeal of the French decrees is made a condition of the repeal of the British orders; and

89. *Ibid.*, pp. 408, 409.
90. *Ibid.*, p. 410.
91. *Ibid.*, p. 412. See also pp. 434–437 and 443.
92. *Ibid.*, p. 376.
93. *Ibid.*, p. 378.

particularly whether the condition embraces the seizure of vessels and merchandise entering French ports in contravention of French regulations, as well as capture on the high seas of neutral vessels and their cargoes, on the mere allegation that they have on board British productions and manufactures." [94]

But Great Britain was not to be pinned down and her Minister responded with the familiar refrain. The Orders will not be withdrawn "until the French decrees . . . shall be effectually repealed, and thereby neutral commerce be restored to the situation in which it stood previously to their promulgation. . . ." [95] America had heard this for four years and was not apt to find it more enlightening than it had been in the past.

Nevertheless in April a new Order in Council transferred the determination of the question whether or not the Decrees had been repealed from the Cabinet to the Courts. The claimant of any ship taken for violation of the Orders was given the right to give evidence before the Courts of Admiralty that the French decrees had been revoked by some authentic act. Should evidence be presented "that such repeal by the French Government had been by such authentic act promulgated prior to such capture . . . the voyage shall be deemed and taken to have been as lawful as if the said orders in council had never been made. . . ." [96]

But could the courts be expected to accept as evidence what the Government had already condemned as false and fraudulent? The *Snipe* is the one case which might answer this question although it is not too conclusive as it was decided after the outbreak of the War of 1812. It does, however, shed further light on the attitude of the British prize courts. In the *Snipe* the Court returned a negative answer—an answer in terms familiar to those who had had the opportunity to hear the opinions of the British Government. The Court, too, found that documentary evidence in support of the Cadore letter of August 5 was lacking; that the Duc de Bassano's report to Napoleon contained no mention of any exemption in favor of the United States. As to the fact that there had been no violations of American neutrality on the high seas, it was complained that Barlow's letter to this effect, pre-

94. *Ibid.*, p. 438.
95. *Ibid.*, p. 439.
96. *Ibid.*, pp. 430, 431.

sented as evidence, stated *a belief* not a knowledge of fact. As to actual restitutions, these were "acts of state, proceeding on motives of policy or humour in the particular instances—not judgments of tribunals acting upon a known law, at the instance of parties who claim the benefit of it." [97] It is apparent from this decision that had peaceful relations continued American mariners would have found but little relief in the courts.

When relief did come, it came from the Government and it came too late. On June 18, 1812, the Orders in Council were repealed. On June 4 the American Congress, inflamed by dreams of expansion in Florida and Canada, had declared war on England.

Motives of the Retaliatory Acts

The possibility of abuse in following a retaliatory policy is apparent. Once a policy of this kind is embarked upon, such barriers as have been created by the law of war are overturned. In the area covered by a retaliatory policy prize courts lose their international character and apply not the law of nations but the "intention of the sovereign." Neutrals lose any rights that the belligerents choose to take from them. Belligerents use against each other such weapons as they find most useful under such regulations as they see fit to observe. And all this is done not with the plea that self preservation knows no law but under the claimed protection of the very law that these acts would seem to overturn. Each act of a belligerent, therefore, which is described as retaliatory must be examined carefully, and before it is given the description which it claims, two questions must be answered in the affirmative. First, was this measure adopted solely in response to the illegal act of an enemy? Second, does this measure have as its principal aim the forcing of an enemy to withdraw the illegal act to which the measure is a response?

Neither of these questions can be answered in the affirmative with regard to the British Orders in Council and the French Decrees. The French Decrees were adopted in pursuance of a long established policy of weakening Britain by excluding her commerce from the Continent and had as their ultimate aim the defeat of England through the dis-

97. Decided by Scott in July, 1812. Edwards, *op. cit.*, p. 380.

ruption of her economic organization. The British Orders were adopted to make it possible to force British trade on the Continent in order to preserve the mercantile structure upon which Britain's maritime strength and hence its life depended.

Napoleon's policy was based on the idea, common in physiocratic, revolutionary France, that British prosperity, founded as it was upon commerce and credit, was wholly artificial.[98] Therefore as Professor Heckscher put it "The prime object of Napoleon's policy . . . was to bring about a dislocation, to prevent the sale both of manufactured products and of the colonial goods imported with a view to re-export, and consequently to ruin the credit system and to create unemployment in industry." [99] The measures used to achieve this aim, even before the adoption of the Continental System, involved exclusion of British goods and have already been described.[100] A report laid before the Corps Legislatif by the Minister of the Interior on August 24, 1807, describes the situation, not as it actually existed, of course, but as Napoleon would have liked to see it. "England," the report read, "sees her merchandise repulsed from the whole of Europe, and her vessels laden with useless wealth wandering around the wide seas, where they claim to rule as sole masters, seeking in vain from the Sound to the Hellespont for a port to receive them." [101]

Yet another motive for the destruction of British trade and credit may be found in the fact that throughout the war Britain, although lacking a supply of exportable gold, was able to provision her garrisons abroad and subsidize her allies through the proceeds of her foreign trade. Thus Napoleon by ruining the British export trade "might do away with the resources which saved . . . the British government from the constant necessity of sending gold abroad to meet their foreign expenses, the navy, the garrisons, the subsidies, the interest on that part of the Debt held by foreigners." [102]

The British on their side were well aware that their naval strength was dependent upon commerce and that they in turn were peculiarly dependent on their navy. Lord Bathurst might oppose retaliation on the grounds that it would result in war with America whose commerce

98. Audrey Cunningham, *op. cit.*, p. 15.
99. Heckscher, *op. cit.*, p. 262.
100. *Supra* p. 125.
101. Quoted in Heckscher, *op. cit.*, p. 74.
102. Audrey Cunningham, *op. cit.*, p. 4.

he felt was more important to Britain than that of the Continent. But as to commerce in general he agreed with others in the British Cabinet that "Our ability to continue the war depends on our commerce; for if our revenues fail from a diminution of our commerce, additional imports will only add to the evil. The enemy forms one great military empire. The extent of country he covers does not render him so dependent on an export and import trade. The whole of that trade might perish and he could still continue the war. If one third of ours were to fail we should soon be reduced to peace." [103]

This being the case, the greater the degree of protection and encouragement afforded to British trade, the lesser the likelihood of British defeat. Whether or not the Orders in Council were, as one prominent merchant charged, "purely the result of commercial calculation" [104] they had as their chief aim the protection of Great Britain through the protection of its commerce. This is apparent from the statements of Cabinet members and party leaders whether Whig or Tory.

Although when out of office the Whigs used the dissatisfaction of important sections of the population with the Orders as a stick with which to beat the Tories, it was when the Whig leader Lord Grenville was Prime Minister that the first openly retaliatory Order in Council was put into effect. The provisions of that Order of January, 1807, were anticipated in a letter from Lord Auckland to the Prime Minister. "You will recollect that in August we prohibited the communication between the enemy's ports and ports specially blockaded. The object now would be to prohibit generally all communication in neutral ships between enemy's ports and enemy's ports. The pressure of such a measure would be severely felt by France, and our own immediate trade with the Continent would be promoted by it." [105] In the same letter the Berlin Decree is mentioned in connection with the increased number of vessels going from Great Britain to Northern ports, but there is no hint of any relation between the French act and the measures proposed by Auckland.

The system attained its heights under Tory leadership, however, and we find Spenser Perceval, after describing the operation of the Novem-

103. Quoted in Adams, *op. cit.*, vol. IV, pp. 94, 95.

104. Baring, *op. cit.*, p. 12.

105. Historical Manuscripts Commission, *Report on the Manuscripts of J. B. Fortesque Esq. preserved at Dropmore* (London, 1892–1927), vol. 8, p. 473.

ber Order in Council, adding "If he [Napoleon] can keep out our trade he will; and he would do so if he could, independent of our orders. Our orders only add to this circumstance: they say to the enemy, if you will not have *our* trade, as far as we can help it you shall have *none*. And as to so much of any trade as you can carry on yourselves, or others carry on with you through us, if you admit it, you shall pay for it. The only trade cheap and untaxed which you shall have, shall be either direct from us, in our own produce and manufactures, or from our allies whose increased prosperity will be an advantage to us." [106]

Even before the fall of the Whig Government, Perceval was prepared to show that trade carried on under the system he supported might be more profitable than trade carried on under ordinary circumstances. Criticizing the weakness of the January Order in Council in the House of Commons, he argued, "You might turn the provisions of the French decree against themselves, and as they have said that no British goods shall sail freely on the high seas, you might say that no goods should be carried to France except they first touched at a British port. They might be forced to be first entered at the customs-house, and a certain entry imposed, which would contribute to enhance the price and give a better sale in the foreign market to your own commodities." [107] Thus in February did Perceval summarize the essential features of the Order that appeared ten months later.

Such frankness, while useful in Parliamentary debate, might be dangerous in describing an actual government policy. As a member of the Cabinet to which Perceval submitted the draft of the November Order, Canning counseled caution. "I would keep out of sight the exceptions in favor of ships going from this country, the benefit of which might be equally obtained by licenses; but the *publication* of that exception would give the measure the air of a commercial rather than a political transaction." [108]

Nor was the fear of neutral competition altogether absent from the calculations that produced the Orders in Council. On this subject James Stephens, author of the influential work, *The Frauds of Neutral Flags*, was prepared to preach at length. "We have already been much

106. S. E. Winbolt, *England and Napoleon* (London, 1912), pp. 54, 55.
107. Hansard, vol. 8, pp. 620 *et seq.* 108. Adams, *op. cit.*, vol. IV, p. 92.

supplanted . . . in the West Indies, especially in the supply of the Spanish colonies, by means of neutral commerce. It is notorious . . . that this disadvantageous effect has flowed from our permitting the carriage of the produce of these colonies, under neutral flags, to Europe, and the carrying back of returns in continental manufacturers, for the supply of these colonies through America. . . . If then, by a repeal of our Orders in Council, neutral vessels could carry directly and safely from the ports of the United States to the continent of Europe, beyond doubt that would be the only course of commerce for the rich exports of the New World, and foreign manufactures alone would be received there in return. We should soon have no trade beyond the Atlantic, that of our own colonies excepted. We might perhaps continue to import from the United States, such articles as we ourselves consume; but even for those, should find it hard to pass our own manufactures in payment." [109]

On occasion the commercial motive was even allowed to appear in diplomatic correspondence. "The object of our system," Monroe was informed, "was merely to counteract an attempt to crush the British trade; Great Britain endeavouring to permit the continent to receive as large a portion of commerce as might be practicable through Great Britain; and all her subsequent regulation, and every modification of her system by new orders or modes of granting or withholding licenses, have been calculated for the purpose of encouraging the trade of neutrals through Great Britain, whenever such encouragement might appear advantageous to the general interests of commerce and consistent with the public safety of the nation." [110]

Before war broke out between England and the United States, France had repealed the Berlin and Milan Decrees with respect to the United States and England had withdrawn her Orders in Council. Ostensibly France repealed her Decrees insofar as they affected America because the Americans had taken punitive action against Britain and thus removed the cause of retaliatory action. Ostensibly Britain withdrew her Orders in consequence of the repeal of the French decrees. In point of fact, on neither side was withdrawal in any way connected with the fact that a situation which had called for reprisals was no longer in existence.

109. Hansard, vol. 13, Appendix II, pp. LVII *et seq.*
110. *Foreign Relations of the United States*, vol. III, p. 435.

French withdrawal was the result of Napoleon's two-fold desire to placate the United States and to involve the Americans in still further conflicts with Britain. When considering this withdrawal in June, 1810, Napoleon made it quite clear to his officials that should the decrees be repealed, the customs legislation would continue to "regulate arbitrarily duties and prohibitions. The Americans will be able to bring sugar and coffee into our ports,—the privateers will not stop them because the flag covers the goods; but when they come into a port of France or a country under the influence of France, they will find the customs legislation, by which we shall be able to say that we do not want the sugar and the coffee brought by the Americans because they are English merchandise; that we do not want tobacco, etc.; that we do not want such or such goods, which we can as we please class among prohibited goods. Thus it is evident that we should commit ourselves to nothing." [111] In short the Decrees were to be repealed but the Continental System was to be continued. Napoleon's instructions to his Council of April 29, 1811, echoed this statement adding that, if necessary, the status of neutral trade might be left in complete confusion until the inevitable opening of hostilities between the United States and Great Britain.[112]

Napoleon pretended to withdraw his Decrees to placate the Americans; the British Government was forced to repeal its Orders by the opposition of large sections of the English people to their continuance, although the situation by which retaliation had originally been justified had changed but slightly. There had always been a vocal group denouncing the Orders particularly among those interested in the American trade. The Whigs, furthermore, after their loss of office, adopted the Orders in Council as an important issue and lost no opportunity to criticize the Government on the score of the Orders' illegal-

111. Adams, *op. cit.*, vol. V, p. 245.

112. *Ibid.*, pp. 402–403. That the United States was not ignorant of Napoleon's determination to continue the enforcement of the Berlin and Milan decrees as municipal ordinances is evident in a letter from Russell to the American chargé in London: "To prevent their performing this function does not appear to be a concern of the United States. . . . It is sufficient for us that the Berlin and Milan decrees have ceased to be executed on the high seas; and if orders in council still continue to operate there, they surely are not supported by any principle of the law of retaliation, but must be considered as a simple and unqualified violation of our neutral and national rights." *Foreign Relations of the United States*, vol. III, p. 447.

ity, their impractibility, their bad effects on American relations, their injurious effects on trade, and their unintelligibility.[113] On every possible occasion the question was brought to the fore and in the spring of 1812 the campaign against the Orders reached new heights.

Rightly or wrongly, all the economic ills from which the country was suffering were attributed to the Orders. A particularly vivid petition from Paisley describes the depressed state of the cotton manufacture, the rise in unemployment, and the fall in wages in a town where of 30,000 inhabitants, 1,200 families, formerly self-supporting, were dependent upon charity. All this the petitioners believed was "chiefly owing to the exclusion of our commerce from the continent of Europe, and the stoppage of our trade with America, in consequence of the orders in council and the blockading system." [114] Forty thousand inhabitants of Manchester expressed their belief that relief from the unexampled poverty, suffering and unemployment in that city might be found in a revocation of the Orders in Council which action would, they thought, have as its inevitable consequence the repeal of the Non-Intercourse and Non-Importation Acts.[115] Similar petitions poured in from all parts of the country—from the Staffordshire potters, the Worcester porcelain manufacturers, the woolen manufacturers of the West Riding, the Liverpool shipwrights, ropemakers, sailmakers, and carpenters, the mechanics of Glasgow, the knitters of Leicester, the merchants of Birmingham.[116] In all the loss of neutral trade was lamented, particularly that of the United States, and the mushroom growth of American manufacturing was laid, with all other evils, at the door of the Orders.

In April the Courts had been instructed to accept evidence that the French decrees had been repealed. In June the British Orders were revoked. The act of revocation itself declared that no satisfactory *evidence* of the repeal of the French decrees had appeared since April.[117] If retaliatory measures were justifiable in April they were justifiable in June. The Saint Cloud decree definitely revoking the Berlin and Milan Decrees was certainly open to suspicion. Why should such a decree appear dated a year earlier; why if the date were authentic, had

113. See Hansard, volumes 10 through 23, *passim.*
114. *Ibid.*, vol. 23, p. 1017.
115. *Ibid.*, vol. 20, p. 341.
116. *Ibid.*, vols. 22 and 23, *passim.*
117. *Ibid.*, vol. 23, p. 70.

it not been communicated to the United States in 1811 instead of in 1812? Why should the British Government accept a document as a basis for repealing the Orders in Council that they did not consider "as satisfying the conditions set forth" in the Order of April, 1812? Simply because just as in the past any excuse was seized upon to justify retaliatory acts, now any excuse was seized upon to pacify the opposition at home and to avert the dangers of war with the United States.

In summary—the Orders and Decrees of Britain and France were justified as retaliatory but do not, on analysis, prove to merit this description. In reality they were measures adopted in furtherance of the strategy of commercial war. It is not surprising, therefore, to find that the so-called retaliatory measures were often widely different in nature and intended effect from the acts which they purported to answer. This was so because the real object was not to force the enemy to cease acting in an illegal fashion but to defeat the enemy with commercial weapons. Consequently the weapons adopted were those regarded as most likely to achieve the end in view without reference to their appropriateness as measures of retaliation. One must conclude, then, that the doctrine of retaliation was used in the Napoleonic Wars not as a means of compelling the enemy to return to the paths of legality but as a justification of illegalities and attacks on neutral rights arising inevitably from measures of commercial warfare that each side felt to be essential to the achievement of victory. For this purpose the doctrine of retaliation is particularly suitable since its very *raison d'être* is the legalization, under certain circumstances, of actions that normally would be contrary to law.

CHAPTER VI

Retaliation in the First World War

THE RETALIATORY DECREES of the Napoleonic Wars had produced major alterations in the status of neutrals. In the century between this conflict and the first World War, however, there was neither clarification of neutral rights with respect to belligerent retaliation nor drastic change in the neutral position. This may be ascribed to the fact that, although the period was far from peaceful, there were no wars on the scale of the two great conflagrations. Then too, in such wars as there were, with the exception of the Crimean War, the potential strength of the neutrals was as great or greater than that of the belligerents.

In the legal field the neutral position was modified favorably by the Declaration of Paris of 1856 and unfavorably by the extension in the courts of the United States during the Civil War of the doctrine of continuous voyage. The Declaration of Paris which established as law two principles, long fought for by neutrals, that blockades to be legal must be effective and that free ships make free goods, was either ratified or tacitly accepted by the entire international community. The efficacy of the Declaration as a protection for neutrals was, however, dependent upon some subsequent definition of contraband, for innocent goods only were protected by the free ships principle. In the past the concept of contraband had been stretched constantly in favor of the belligerent and, in the absence of an internationally accepted definition, might continue to expand.[1] Further attempts, however, to clarify and improve the position of neutrals at the two Hague Conferences and at London were unsuccessful, either through omission or through failure of ratification of the resultant conventions, in dealing

1. Philip C. Jessup, *Neutrality*, vol. II, p. vi.

with the vital questions of contraband, visit and search, and destruction of prizes.[2]

American interpretation of the doctrine of continuous voyage during the Civil War enlarged the possibility of condemnation of goods as prize by regarding as good prize contraband shipped to neutral ports but having the Confederate States as ultimate destination.[3] Decisions such as these strengthened the tendency present in the eighteenth and early nineteenth centuries to apply the doctrine, originally formulated to enforce the rule of 1756, to contraband trade and to blockade violation. Unilaterally put forward by the American courts, this extension of the doctrine of continuous voyage could hardly be regarded as established law. It was extremely unlikely, however, that future belligerents would fail to make use of a concept so favorable to their interests particularly one which, as a neutral, the United States could not consistently oppose.

Thus, as to the law, the position of the neutral at the outbreak of World War I has been summarized by Professor Philip C. Jessup as follows:

> 1. "Paper" blockades are illegal. To be binding a blockade must be effectively maintained by "adequate" naval force.
>
> 2. Enemy goods are safe on a neutral ship if not contraband and not destined for a blockaded port.
>
> 3. Neutral goods are safe on an enemy ship under the same conditions.
>
> 4. Neutral goods are safe on a neutral ship under the same conditions.
>
> 5. Contraband is divided into two categories, absolute and conditional.
>
> 6. Absolute contraband includes goods exclusively used for war and destined for an enemy country even if passing through a neutral country en route.
>
> 7. Conditional contraband includes goods which may have a

2. James W. Garner, *Prize Law During the World War* (New York, 1927), p. 143.

3. It was not clear in all cases whether the condemnation was based on blockade violation or carriage of contraband. Herbert W. Briggs, *The Doctrine of Continuous Voyage* (Baltimore, 1926), p. 43.

peacetime use but which are also susceptible of use in war and which are destined for the armed forces of a government department of a belligerent state; the rule of continuous voyage does not apply to this category.[4]

But from the earliest days of the first World War it was apparent that technological changes in methods of war and war production were to be of greater influence on the rights of neutrals than legal principles established by custom or treaty. In the economic field, there had been an enormous advance in industrial processes making possible the utilization of commodities of infinite variety for warlike purposes. In the political field, government had come to exercise controls over increasingly varied aspects of the lives of its citizens and had at hand the techniques and habits which would make possible the expansion of such controls should the occasion demand it. These were changes in degree, while in the sphere of naval warfare a change in kind was effected by two important inventions—the mine and the submarine.

Arguing that these developments had changed the character of warfare, the belligerents claimed the right to use methods which, although not wholly unprecedented, reached new heights in the limitations that they imposed upon neutrals. The commodities that could be used, directly or indirectly, for warlike purposes constantly grew in number. The relationship between government and the daily lives of the governed became ever more intimate. The emphasis thus given to the "nation in arms" theory produced not only such obvious results as the extension of contraband lists but also such complicated requirements as neutral guarantees not to re-export, and subsequently the imposition of limitations on the quantity of a given product that could be imported into a neutral state.[5] Mines and submarines were epoch-making not merely as new methods of warfare but also as they led to still other new techniques by which they might be combatted. The submarine, with its peculiar effectiveness and its peculiar vulnerability led to new concepts of visit and search on the one hand, new concepts of the treatment of prize on the other; [6] armed merchant ships re-emerged; and

4. Edgar Turlington, *Neutrality: Its History, Economics, and Law*, vol. III, *The World War Period* (New York, 1936), p. x.

5. *Ibid.*, pp. 5–23.

6. For discussion of the introduction of mine and submarine warfare in the

the war zone, hitherto confined to areas of actual naval combat between two belligerents, was expanded to cover vast areas on the high seas.[7]

It should be noted that few of these extensions of international law were defended as retaliatory. Minelaying was actively supported by Germany as legal under certain circumstances, practiced by Britain with but passing reference to retaliation, and by the United States without any appeal at all to retaliatory privileges.[8] The contraband list was expanded many times, new criteria for the presumption of enemy destination were set up, vessels were made liable to capture after the completion of the voyage from which the liability arose, these and other departures from past prize procedure being defended on the grounds that they were both necessitated and justified by the new conditions of modern warfare.[9] Such other interferences with neutral freedom as bunker control, export and import embargos, and black listing were based on "sovereign right." In striking contrast to the experiences of the Napoleonic period where both belligerents depended exclusively upon retaliation to justify their measures, in World War I of the many innovations in naval prodecure arguments drawn solely from the doctrine of retaliation were for the most part used only to justify the introduction of the British "blockade" and the German submarine campaign. For each belligerent, however, it was the retaliatory measure that was to give full force and effect to other weapons previously adopted, and adopted on different grounds. Hence the retaliatory orders of World War I despite their seemingly more limited scope cannot be regarded as any less vital in the prosecution of the war than were their Napoleonic counter-parts.

Russo-Japanese War and the precedents therein established see Thomas Baty, "The Supposed Chaos in the Law of Nations," 63 *University of Pa. Law Review* (1915).

7. James W. Garner, *International Law During the World War* (New York, 1920), vol. I, p. 352.

8. Harvard Law School, *Research in International Law*, "Rights and Duties of Neutral States," p. 705.

9. German expansion of the contraband list and adoption of other changes previously introduced by Great Britain was, on the other hand, based on the right of retaliation. Cf. *infra* p. 177.

Retaliatory Measures

It was in the questions of contraband and war zones that the first impact of the new conditions of war was felt. Between August and December of 1914 Great Britain had greatly expanded its lists of both absolute and conditional contraband and had been followed in this practice by France and Russia.[10] In the Order in Council of August 20, 1914, the doctrine of continuous voyage was applied to conditional contraband. Goods of that category were henceforth to be regarded as destined for the use of the enemy's armed forces or government departments if consigned to an agent of the enemy state or a merchant under the control of its authorities.[11] In October it was further provided that conditional contraband on a vessel bound to a neutral port was confiscable if consigned "to order" or if the ship's papers did not show the consignee, or if such papers showed an ultimate consignee in territory belonging to or occupied by the enemy. The burden of proof of innocent destination was placed on the owner of the goods and any vessel that proceeded to an enemy port despite papers indicating a neutral destination was to be liable to capture at any time before the completion of its next voyage.[12] Later in the year, Britain laid the groundwork for subsequent control of neutral shipping by providing that henceforward neutral vessels were to be taken into port for search.[13] At no time in the course of these modifications of international law was the plea of retaliation put forward although the argument that changed conditions of warfare had made them necessary was frequently advanced.

In the sphere of minelaying and the establishment of war zones the retaliatory argument was tentatively put forward on several occasions but never became the sole justification for the adoption of such policies. On August 7, 1914, Germany announced that mines had been planted in harbors and roadsteads which might serve as bases for hostile forces.[14] Later in the same month the British Government reserved its

10. Turlington, *op. cit.*, p. 5.
11. *Foreign Relations of the United States*, 1914, Supplement, p. 220.
12. Turlington, *op. cit.*, p. 11.
13. *Ibid.*, p. 12. See *Foreign Relations of the United States*, 1915, Supplement, p. 301, for Sir Edward Grey's defense of this policy.
14. *Foreign Relations of the United States*, 1914, p. 454*n*.

freedom to take similar measures.[15] In October the British mined a zone of 3,000 square miles and in November declared the North Sea a military area. Arguing that Germany had laid mines indiscriminately and improperly the British declared that "In these circumstances, having regard to the great interests entrusted to the British Navy, to the safety of peaceful commerce on the high seas, and to the maintenance within limits of international law of trade between neutral countries, the Admiralty feel it necessary to adopt exceptional measures appropriate to the novel conditions under which this war is being waged." [16] Both this statement and the French statement that "Automatic mines having been sown on the Adriatic Sea by the Austro-Hungarian Navy, the French naval forces have been obliged to resort to similar measures in the said sea," [17] have a retaliatory flavor but in point of fact, the British Government subsequently defended its war zone as being legal in itself as "an area determined by the actual laying of mines or other obstructions permitted by the laws of war. . . ." [18]

The German Submarine Campaign

The first measure to be adopted on clearly retaliatory grounds was embodied in the German Proclamation of February 4, 1915. In this proclamation Britain was accused of carrying on "a mercantile warfare against Germany in a way that defies all the principles of international law." [19] More specifically it was charged that Britain had renounced the most important provisions of the London Declaration, had put articles on the contraband list that were at most only indirectly useful for military purposes, had abolished the distinction between absolute and conditional contraband, had seized non-contraband German property on neutral ships, had taken German subjects from neutral ships and made them prisoners, and had declared the entire North Sea an area of war. Germany, therefore, "sees itself forced to military measures aimed at England in retaliation against the English procedure. Just as England has designated the area between Scotland and Norway as an area of war, so Germany now declares all the waters

15. *Ibid.*, pp. 455, 456.
16. *Ibid.*, p. 464.
17. *Ibid.*, p. 462.
18. *Ibid.*, 1918, Supplement 1, vol. II, p. 1761.
19. *Ibid.*, 1915, Supplement, p. 96.

surrounding Great Britain and Ireland including the entire English Channel as an area of war, and thus will proceed against the shipping of the enemy." After February 18 Germany would attempt to destroy every enemy merchant ship found in this area without always being able to avert the peril thus threatening persons and cargos. Neutrals were therefore warned against making use of Allied merchant ships and against sending their own ships into this area for, although violence to neutral ships was to be avoided as far as possible, because of the contingencies of naval warfare and the British misuse of neutral flags "their becoming victims of torpedoes directed against enemy ships cannot always be avoided." [20]

Like Napoleon's early retaliatory decrees, and perhaps because of the same awareness that the means to enforce the threat were not yet at hand, the German proclamation was somewhat vague as to the measures to be taken under it. Indeed, from the time of its announcement until the declaration of unrestricted submarine warfare in February, 1917, German policy fluctuated constantly, the actions of submarine commanders furthermore frequently contradicting the statements of responsible officials. The tortuous history of these fluctuations has been fully and often treated.[21] It need be summarized here only in order to discover what were, in practice, the innovations introduced by Germany in the name of retaliation.

On February 16, 1915, the American Government was informed that the threat to destroy ships in the war zone applied only to enemy merchant vessels and that the commanders of German submarines had been instructed to refrain from violence to American merchant vessels when recognizable as such.[22] By the end of May, however, eighteen neutral vessels valued at $700,000 had been sunk in the German war zone. In addition, neutral cargoes worth $1,000,000 had gone down in belligerent ships [23] and the sinking of the *Lusitania* had raised arguments of humanity against the submarine campaign more powerful than those of commercial calculation. Neutral, chiefly American, pressure resulted in an order on June 1 that submarine commanders were not to attack merchant vessels unless firmly convinced that they be-

20. *Ibid.*, pp. 96, 97.
21. See Bemis, *op. cit.*, ch. xxxii for a brief survey.
22. *Foreign Relations of the United States*, 1915, Supplement, pp. 114, 115.
23. Turlington, *op. cit.*, p. 42.

longed to an enemy. An additional German order instructed submarine officers to refrain from attacks on large passenger vessels even though of enemy ownership. For reasons of prestige, however, this order was kept secret until the sinking of the British liner *Arabic* in August made revelation essential to support the German contention that the ship must have struck a mine.[24] The agitation caused by this event and the fact that two Americans had lost their lives resulted in the German statement of September 1, 1915, that "Liners will not be sunk by our submarines without warning and without safety for the lives of non-combatants provided that the liners do not try to escape or offer resistance." [25] Three days later the English liner *Hesperian* was torpedoed without warning. To American protests von Jagow replied that as American lives had not been lost, the Government of the United States had no concern in the matter.[26]

Henceforth the submarine campaign both as against belligerents and as against neutrals was greatly intensified. In February, 1916, it was announced that armed merchant ships would be regarded as public ships of war and sunk without warning and without provision for the safety of passengers.[27] The American threat to sever relations was answered by the German note of May 4, 1916: "The German Government . . . notifies the Government of the United States that the German naval forces have received the following orders: in accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance." [28] But the effect of this statement in meeting the American demands was nullified by the qualifications which followed.

Neutrals, it was argued, with a backward glance at the old doctrine that such states are obliged to defend their rights against belligerents, "cannot expect that Germany, forced to fight for her existence, shall for the sake of neutral interest, restrict the use of an effective weapon

24. Charles C. Tansill, *America Goes to War* (Boston, 1938), p. 342.
25. *Foreign Relations of the United States*, 1916, Supplement, p. 198.
26. *Ibid.*, 1915, Supplement, p. 545; Tansill, *op. cit.*, p. 370.
27. *Foreign Relations of the United States*, 1916, Supplement, pp. 163–165.
28. *Ibid.*, p. 259.

if her enemy is permitted to continue to apply at will methods of warfare violating the rules of international law. . . . Accordingly, the German Government is confident that, in consequence of the new orders issued to its naval forces, the Government of the United States will now also consider all impediments removed which may have been in the way of a mutual co-operation towards the restoration of the freedom of the seas during the war . . . and it does not doubt that the Government of the United States will now demand and insist that the British Government shall forthwith observe the rules of international law universally recognized before the war. . . . Should the steps taken by the Government of the United States not attain the objective it desires, to have the laws of humanity followed by all belligerent nations, the German Government would then be facing a new situation in which it must reserve itself complete liberty of decision." [29]

Given the known views of the United States as to the strict separation between the maintenance of neutral rights and the retaliatory measures taken by the belligerents against each other, little could be expected from this policy and the decision at the Pless Conference on January 9 to resume unrestricted submarine warfare was but its logical outcome.

With variations induced by expediency, the core of the German retaliatory program was the sinking at sight of merchant vessels, belligerent and neutral, without warning and with no provision for the safety of passengers and crew. This, of course, meant the abandonment of the doctrine of visit and search which in the past had been applied both to belligerent and to neutral merchant vessels, and by which the nationality of the ship and the nature of the cargo were investigated before any action was taken. It meant too the substitution of immediate destruction of prizes for the old rule that prizes could be destroyed only if any other course would involve dangers to the capturing ship or to the operations in which that ship was engaged and that, even under these circumstances, a ship might be sunk only after due provision had been made for the safety and preservation of passengers, crew, and ship's papers.

The illegality of these measures under ordinary circumstances was, of course, admitted, and it is by their appropriateness as acts of re-

29. *Ibid.*, pp. 259, 260.

taliation that they must stand or fall. In considering this question, the argument that the policy laid down in the February, 1915, proclamation was a retaliation against British contraband and prize measures may be dismissed at once, since on April 18, 1915, Germany retaliated directly and appropriately against Britain's alleged illegalities with regard to contraband by adopting them in every detail.[30]

Submarine warfare, on the other hand, bore a fairly close relationship to allied minelaying in designated war zones although, by neglecting to provide safe routes, the Germans were placing neutral lives and property in much greater jeopardy. Nevertheless, the principle—the destruction of merchant vessels without visit and search or provision for the safety of those on board was the same in each case, although carried to much greater lengths by Germany. Germany on its side pleaded not only retaliation against war zones but also the inability of submarines to carry out the old deliberate procedures against merchant ships that were armed and ordered to attack. On this point Bernstorff's note to Bryan accusing the British of ordering their armed merchant vessels to sail in groups, to ram enemy submarines while undergoing search, to overpower searching parties or to drop bombs on them if they came alongside declared: "English merchant vessels in the designated waters are therefore no longer to be regarded as undefended, and so may be attacked by the Germans without previous warning or visit." [31]

The argument was next extended to neutral ships since, it was charged, the admitted British misuse of neutral flags "warrants the assumption that English merchant ships will resort to every means of rendering themselves unrecognizable as such . . ." and thus make impossible the recognition of genuinely neutral vessels. "Visit and search are put out of the question by reason of the attacks to be expected from disguised English merchant ships, since the same would expose the boarding party and the submarine itself to destruction." [32]

British Shipping Regulations

Britain's response to the submarine campaign was embodied in the Order in Council of March 11, 1915, the provisions of which were subsequently adopted by France. In this Order Britain asserted an "un-

30. *Ibid.*, 1915, Supplement, pp. 162, 163.
31. *Ibid.*, p. 104.
32. *Ibid.*, pp. 104, 105.

questionable right of retaliation . . ." derived from German orders "which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all the British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare." [33] In a subsequent note the list of German crimes for which retaliation was authorized was enlarged to include the treatment of civilians in Belgium and Northern France, the barbarous treatment of prisoners, and the bombardment of open towns and districts without military importance.[34] In the main, however, emphasis was laid upon the submarine campaign as the basis for Britain's retaliatory measures.

The measures themselves had as their avowed object "to prevent commodities of any kind from reaching or leaving Germany. . . ." To this end it was ordered as follows:

> 1. No merchant vessel that sailed after March 1 was to be allowed to proceed to a German port. Unless a neutral vessel obtained a pass to a neutral or allied port it was to discharge its cargo in Britain where it would be placed in the custody of the Prize Court marshal. Such goods as were not contraband or requisitioned by His Majesty were to be restored on such terms as the Prize Court might in the circumstances deem just to the person entitled thereto.
>
> 2. No ship that sailed from a German port after March 1 was to be allowed to proceed with any goods on board laden at such a port. All such goods were to be discharged in British or allied ports and placed in the custody of the marshal. If not requisitioned by His Majesty they were to be detained or sold under the direction of the Prize Court, the proceeds to be paid into Court and dealt with in such manner as the Court might in the circumstances deem to be just. No such proceeds were to be paid out of Court until the conclusion of peace except on the application of the proper officer of the Crown unless the goods became neutral property before the Order.
>
> 3. Every merchant vessel sailing after March 1 to other than

33. *Ibid.*, p. 144.

34. *Ibid.*, p. 143.

a German port carrying goods which were enemy property or of enemy destination might be required to discharge its cargo at a British or allied port. Such goods if not requisitioned by His Majesty or contraband were to be restored as in Article 1.

4. Every merchant vessel sailing after March 1 from other than a German port with goods of enemy origin or ownership might be required to discharge its cargo at a British port where it would be treated as in 2 above.

5. Persons claiming an interest in any such goods which were not contraband might apply for an order that the goods be restored to him.

6. Any merchant vessel that cleared for a neutral port from a British or Allied port or which was allowed to pass as having ostensible neutral destination and which proceeded to an enemy port was liable to condemnation if captured on any subsequent voyage.[35]

What, exactly, was the position of the neutral under this somewhat complicated order? In the first place, neutrals were henceforth to be prevented from trading directly with Germany. Ships attempting to do so were to be required to proceed to a British port and discharge their cargo. To this point, the effect on the neutral was the same as that of a traditional blockade. Unlike blockade policy, however, only that part of the cargo which was contraband was to be confiscated and the rest released to the owner, or, in the case of enemy goods loaded at an enemy port, detained for the duration.

But, although the first two provisions of the Order, if made effective, would cut off all direct trade to and from Germany, additional measures were required to intercept commodities destined for Germany through neutral countries. Therefore it was provided that neutral goods proceeding to neutral ports but ultimately destined for the enemy were to be treated in the same manner as goods sent directly to Germany.[36]

35. *Ibid.*, pp. 144, 145.

36. It should be recalled, in this connection, that Great Britain presumed enemy destination in all cases where cargo was consigned to order, or to dealers known to have supplied articles of the kind in question to the enemy government or its army, or to have supplied them directly or indirectly with contraband, or when the amount of goods was in excess of the quota assigned to any given neutral as required for its own consumption or non-enemy trade.

Goods of enemy ownership or origin loaded at neutral ports were to be discharged in Britain in the same fashion as similar goods loaded in enemy ports with the modification that neutral owners might apply for the restoration of such goods as were non-contraband. Although these provisions might be regarded as bringing about a blockade of neutral ports, it is important to note that confiscation, the penalty for blockade breaking, was applied only in the case of contraband.[37]

The comparative mildness with which non-contraband was treated in the 1915 Order disappeared in that of February, 1917.[38] This Order, promulgated as a reprisal against the German unrestricted submarine warfare order of February 1, provided that any ship that sailed to or from a port in any neutral country having access to enemy territory, without calling at a British or allied port, was to be presumed to have an enemy destination or a cargo of enemy origin and was to be liable to capture and condemnation in respect of the carriage of such goods. Vessels that called at British or Allied ports for examination of their cargo were favored to the extent that no sentence of condemnation was to "be pronounced in respect only of the carriage of goods of enemy origin or destination." [39] By this act, confiscation became the penalty for violations and, if the conditions of blockade were not present, the effects were.

Germany's submarine campaign introduced new practices in a field where the law was subject to a certain amount of dispute and where existing law was customary in origin and, therefore, difficult to define with precision. The Allies, on the other hand, although adopting measures less repulsive on humane grounds, justified as retaliatory direct violations of one of the few major pieces of international legislation in the sphere of neutral rights in naval warfare. The principle that "free ships make free goods" and the requirement that a blockade to be legal must be effective were cast aside and in addition a virtual blockade of neutral ports was introduced. A neutral damaged by German torpedoing could not even get a hearing in the Imperial Prize

37. In view of the wide extension of contraband lists, too much emphasis should not be laid upon this point as a safeguard for neutrals against the rigors of British policy.

38. This order was not adopted by any of Great Britain's allies. Garner, *Prize Law*, p. 325.

39. *Foreign Relations of the United States*, 1917, Supplement, vol. I, p. 493.

Court,[40] while in Britain the Prize Courts, though still open to neutrals afforded them no protection against a framework of retaliatory and other orders which completely did away with direct neutral trade with the belligerents and regulated in every detail the trade of neutrals as between themselves.

The measures of both belligerents, although dependent upon the laws of retaliation for their justification, were important factors in the program of economic warfare adopted by each. Germany, as the weaker naval and commercial state, resorted to active destruction of enemy merchantmen and the intimidation or destruction of neutral traders while Britain sought through regulation to cut Germany off from all seaborne commerce, either direct or through the ports of neighboring neutrals. But although there was a certain parallelism in the retaliatory practices of Britain and Germany it is not clear that as measures of reprisal they were legally appropriate. Strong argument against accepting them as such lies in the fact that in the true sense they were not intended as retaliatory measures at all; that is, neither belligerent embarked upon a policy of retaliation to force the enemy to cease his illegal acts but rather used those acts as a point of departure for policies which seemed to hold out the only hope of victory and for the adoption of which other pretexts might have served as well.[41]

Belligerent Justification of Retaliatory Measures

Enemy Illegalities

In World War I as in the Napoleonic Wars retaliating belligerents sought legal sanction for and neutral acquiescence in their measures by describing them as the consequence of and the only response to the prior illegalities of the enemy. Anticipating the Order of the following month, a British memorandum of February 17, 1915, declared: "His Majesty's Government consider it would be altogether unreasonable that Great Britain and her allies should be expected to remain indefinitely bound, to their grave detriment, by rules and principles of which they recognize the justice if impartially observed as between belligerents, but which are at the present moment openly set at defiance by their enemy." [42] In March an Order in Council was issued

40. *Infra* p. 191.
41. *Infra* pp. 194–8.
42. *Foreign Relations of the United States*, 1916, Supplement, p. 335.

which asserted that German violations of the usages of war "give to His Majesty an unquestionable right of retaliation." [43]

On the German side, the new method of naval war was described as "imposed and justified by the murderous character of the English method of naval warfare, which seeks to condemn the German people to death by starvation through the destruction of legitimate trade with neutral foreign countries." [44] More detailed was Bernstorff's statement of February 4, 1916. "The German submarine war against England's commerce at sea . . . is conducted in retaliation of England's inhuman war against Germany's commercial and industrial life. It is generally recognized as justifiable that retaliation may be employed against acts committed in contravention of the law of nations. Germany is enacting such retaliation because it is England's endeavor to cut off all imports from Germany by preventing even legal commerce with her and thereby subjecting the German people to starvation." [45]

Attitudes toward Neutral Rights

The German Government complained of neutral acquiescence in what were claimed to be the illegal activities of the British, saying in the Reprisals Proclamation of February 4, 1915, "The neutral powers have generally acquiesced in the steps taken by the English Government. . . . In certain directions they have also aided the British measures, which are irreconcilable with the freedom of the sea, in that they have obviously under the pressure of England hindered by export and transit embargoes the transit of wares for peaceful purposes to Germany." [46] But neither belligerent explicitly advanced the argument, vehemently asserted in the Napoleonic Wars, that since neutral acquiescence was the cause of the perpetuation of enemy illegality, the belligerent right to retaliate arose from this acquiescence and it was both logical and justifiable that the retaliatory decrees should be as destructive of the rights of neutrals as they were harmful to the interests of the enemy.

In World War I the attitude toward neutrals was more conciliatory in intention if equally damaging in fact. Both belligerents argued that, although they had no desire to harm the neutrals, it was necessary for their own preservation that they be allowed to resort to extraordinary

43. *Ibid.*, p. 449.
44. *Ibid.*, p. 105.
45. *Ibid.*, 1916, Supplement, p. 157.
46. *Ibid.*, 1915, Supplement, p. 96.

means of action in response to the illegalities of the enemy and that, as it was inevitable that neutral interests should be affected by such action, the neutrals must acquiesce. Expressing surprise at the argument of the United States that retaliatory measures are illegal if they "incidentally inflict injury upon neutrals" the British declared: "The advantages which any such principle would give to the determined lawbreaker would be so great that His Majesty's Government cannot conceive that it would commend itself to the conscience of mankind. To take a simple instance, suppose that one belligerent scatters mines on the trade routes so as to impede or destroy the commerce of his enemy—an action which is illegitimate and calculated to inflict injury upon neutrals as well as upon the other belligerents—what is that belligerent to do? Is he precluded from meeting in any way this lawless attack made upon him by his enemy? His Majesty's Government cannot think that he is not entitled by way of retaliation to scatter mines in his turn, even though in so doing he also interferes with neutral rights. . . . It would seem that the true view must be that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make an attack upon the other regardless of neutral rights his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent." [47]

This statement, based on the assumption of original enemy lawlessness, argues for unlimited belligerent equality in lawbreaking, with the inevitable consequence to neutral interests dismissed as of less importance than the principle that the enemy's illegality must not go unpunished. In the *Stigstad,* however, Lord Parker's opinion pictured Britain as the defender not only of its own rights but of those of the international community as well, the interests of that community being bound up in Britain's freedom to combat illegality with measures that were untrammeled by the customary restraints of the law of neutrality. "It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by, and obtained relief from, retaliatory measures, if effective to restrain, to punish and to

47. *Ibid.*, 1916, Supplement, p. 378.

bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitory or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas." [48]

Impliedly, however, the British modified their doctrine of an unlimited belligerent right to retaliate regardless of the effects on neutrals, by contending for their own measures that, although they were admittedly retaliatory they were enforced, unlike the German use of the submarine, without risk to life and were in accord with the underlying principles of international law if not with its specific provisions "although those measures may have been provoked by the illegal conduct of the enemy, they do not, in reality conflict with any general principle of international law, of humanity or civilisation; they are enforced with consideration against neutral countries, and are, therefore, juridically sound and valid." [49]

The Germans, although frequently critical of neutral acquiescence in British measures, did not argue, as had the French in the past, that their right to retaliate arose from this acquiescence. Rather they recognized that the neutrals had done all that could legally be required of them by protesting. "The German Government have given due recognition to the fact that as a matter of form the exercise of rights and the toleration of wrong on the part of neutrals is limited by their pleasure alone and involves no formal breach of neutrality. The German Government have not in consequence made any charge of formal breach of neutrality. The German Government cannot, however, do otherwise . . . than to emphasize that they . . . feel themselves placed at a great disadvantage through the fact that the neutral powers have hitherto achieved no success or only an unmeaning success in their assertion of the right to trade with Germany." [50] This being the situation, the German Government although it had no right to demand that the neutrals compel England to respect their privileges could justifiably demand that they acquiesce in such measures as Germany might take to combat England's policy. "If England invokes the power of famine

48. *Lloyds Reports of Prize Cases* (London, 1915–1924), vol. V, p. 393.
49. *Foreign Relations of the United States*, 1916, Supplement, p. 371.
50. *Ibid.*, 1915, Supplement, p. 113.

as an ally in its struggle with Germany with the intention of leaving a civilized people with the alternative of perishing in misery or submitting to the yoke of England's political and commercial will, the German Government are today determined to take up the gauntlet and to appeal to the same grim ally. They rely on the neutrals who have hitherto tacitly or under protest submitted to the consequences detrimental to themselves of England's war of famine to display not less tolerance toward Germany, even if German measures constitute new forms of maritime war, as has hitherto been the case with the English measures." [51]

Although recognizing that no legal obligation on the part of the neutral was involved, the German Government did not fail to suggest to neutrals particularly to the United States, that should they successfully oppose British illegality, German measures would undergo corresponding modification. "The German Government repeat that in the scrupulous consideration for neutrals hitherto practiced by them they have determined upon the measures planned only under the strongest compulsion of national self-preservation. Should the American Government at the eleventh hour succeed in removing, by virtue of the weight which they have the right and ability to throw into the scales of the fate of peoples, the reasons which have made it the imperative duty of the German Government to take the action indicated, should the American Government in particular find a way to bring about the observation of the Declaration of London on the part of the powers at war with Germany and thereby to render possible for Germany the legitimate supply of foodstuffs and industrial raw materials, the German Government would recognize this as a service which could not be too highly estimated in favor of more humane conduct of war and would gladly draw the necessary conclusions from the new situation thus created." [52]

Although avoiding the suggestion that retaliatory acts were caused as much by neutral acquiescence as by belligerent illegality (in the German case going so far as to admit, under American pressure, that "retaliation must not aim at other than enemy subjects") [53] the belligerent argument was equally effective in depriving neutrals of their

51. *Idem.*
52. *Ibid.*, p. 115.
53. *Ibid.*, 1916, Supplement, p. 157.

rights. To the latter it made little difference whether they were asked to acquiesce because they had been unable to enforce their rights as against belligerent illegality, or because belligerents insisted that to observe neutral rights would unjustly deprive them of an advantage already in the possession of the enemy. For the neutrals, the fact remained that, according to belligerent contentions, their protests would succeed neither in causing the belligerents to respect neutral rights during the war nor in securing compensation for the violation of such rights after the war.

Neutral Response to Belligerent Retaliation

Neutral states, although not going so far as to authorize reprisals against the retaliatory decrees of World War I belligerents, expressed their opposition to these measures even more forcibly than had the neutrals in the Napoleonic Wars. This was especially true of the United States. It will be remembered that, during the Napoleonic Wars, American protests, unlike those of other neutrals, had been directed against the nature of the measures employed by the retaliating states rather than against the fact that belligerents in retaliating against each other were violating neutral rights.[54] In World War I, on the other hand, the United States went so far as to deny the legality of the very principle of retaliation, and was at one with other neutrals in affirming as the cornerstone of her opposition the illegality of belligerent reprisals operating through the violation of neutral rights.

The rights of neutrals, the Swedish argued, must be regarded as completely independent of any measures that the belligerents might choose to take against each other. "In the course of the present war, the Royal Government has found it necessary more than once to protest against the measures taken by the belligerents without the regard due to the rights and interests of neutrals. As far as the relations between the belligerents themselves are concerned, it is not necessary to examine whether these measures are justified by the necessities of the war or according to the principles of lawful retaliation. In any case, such considerations could not be appealed to to the detriment of neutral powers who are in no way responsible either for the war or for

54. *Supra* pp. 149–51.

the measures employed by one or other of the belligerents in order to harm the enemy." [55]

Holland, admitting the legality of belligerent reprisals provoked by the lawlessness of the enemy, insisted that such measures of retaliation could not legally infringe upon the rights of neutrals. "Le Gouvernement de la Reine ne peut que répéter une fois encore que d'après les principes fondamentaux du droit des gens, les actes illégitimes d'un des belligérents peuvent il est vrai donner à l'autre le droit de recourir à des représailles contre son ennemi, mais que jamais ces actes ne sauraient justifier des mesures illégales à l'égard des neutres." [56]

In the eyes of the American Government retaliatory attacks upon the neutral position were especially reprehensible when they resulted in the loss of neutral lives. Addressing the German Government, Lansing declared "Illegal and inhuman acts, however justifiable they may be thought to be against an enemy who is believed to have acted in contravention of law and humanity, are manifestly indefensible when they deprive neutrals of their acknowledged rights, particularly when they violate the right to life itself. If a belligerent cannot retaliate against an enemy without injuring the lives of neutrals, as well as their property, humanity as well as justice and a due regard for the dignity of neutral powers, should dictate that the practice be discontinued." [57]

The suggestion that changed conditions of warfare could modify a neutral right of immunity from belligerent reprisals was rejected by the United States without qualification. "The Government of the United States is not unmindful of the extraordinary conditions created by this war or of the radical alterations of circumstance and method of attack produced by the use of instrumentalities of naval warfare which the nations of the world cannot have had in view when the existing rules of international law were formulated, and it is ready to make every reasonable allowance for these novel and unexpected aspects of war at sea; but it cannot consent to abate any essential or fundamental right of its people because of a mere alteration of circum-

55. *Foreign Relations of the United States*, 1915, p. 139.

56. Netherlands note to Great Britain, April 15, 1918, Harvard Law School, Research in International Law, "Rights and Duties of Neutral States," p. 415.

57. *Foreign Relations of the United States*, 1915, Supplement, p. 481.

stance. The rights of neutrals in time of war are based upon principle, not upon expediency, and the principles are immutable. It is the duty and the obligation of belligerents to find a way to adapt the new circumstances to them." [58]

Although belligerents tended to avoid the argument, so popular during the Napoleonic Wars, that neutrals had lost the right to complain against retaliatory measures as they had been unable to assert their rights against the illegalities to which reprisals were a response, neutrals were careful to assert their position on this point.

To the neutrals it seemed adequate to protect their position that they should protest against what they regarded as violations of their rights. Thus the Netherlands Government replying to German complaints of neutral acquiescence in British illegality declared "Since the beginning of the war, the Government of the Queen had protested energetically against every measure taken by the belligerents which, in its opinion, conflicted with international law or impaired its national interests. It has likewise protested when those interests were but indirectly at stake, as in the case of the arrest of German subjects or the unwarranted seizure of German goods on board Dutch ships. . . ." The note went on to describe the many occasions on which the Dutch had made similar protests and concluded by saying "The Netherlands Government, which is scrupulously fulfilling the duties toward belligerents imposed by its neutrality, looks to them for their part to respect its rights." [59]

The United States similarly supported the view that a neutral had done all that was required of it, if not all that it could do, in protesting against belligerent illegalities. In February, 1915, therefore, Bryan reminded the German Government "that the Government of the United States has not consented to or acquiesced in any measures which may have been taken by the other belligerent nations in the present war which operate to restrain neutral trade, but has, on the contrary, taken in all such matters a position which warrants it in holding those governments responsible in the proper way for any untoward effects upon American shipping which the accepted principles of international law do not justify." [60]

58. *Idem.*
59. *Ibid.*, p. 135.
60. *Ibid.*, pp. 98, 99.

The case for neutral freedom of action was strongly put by the Swedish Government which, interpreting German reproaches in the February 4 note as implying that neutrals had lost their right to object to German measures, detailed its protests against British illegalities and added, "if it is the intention of the Imperial Government to put us in the wrong because we thought it sufficient to enter a protest, purely and simply, it must be called to mind that, inasmuch as the belligerents have, within the limits of the law of nations, the choice of means, neutral nations likewise enjoy the same liberty, provided they observe the neutrality which they have proclaimed." [61]

On May 4, 1916, the German Government in announcing its decision to restrict submarine warfare implied that the continuation of this policy would depend upon American ability to force Britain to "observe the rules of international law universally recognized before the war. . . ." [62] To this suggestion the American Government replied with some heat that "it takes it for granted that the Imperial German Government does not intend to imply that the maintenance of its newly announced policy is in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and any other belligerent government . . . the Government of the United States notifies the Imperial Government that it cannot for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any government affecting the rights of neutrals or non-combatants. Responsibility in such matters is single not joint; absolute not relative." [63]

In correspondence with Great Britain, Lansing went so far as to suggest that the use of normally illegal measures in the name of retaliation was itself illegal, although he admitted that the American right to protest arose from the fact that retaliatory measures infringed on neutral rights. He wrote "I believe it has been conclusively shown that the methods sought to be employed by Great Britain to obtain and use evidence of enemy destination of cargoes bound for neutral ports, and to impose a contraband character upon such cargoes, are

61. *Ibid.*, p. 140.
62. *Ibid.*, 1916, Supplement, p. 259.
63. *Ibid.*, p. 263.

without justification; that the blockade, upon which such methods are partly founded, is ineffective, illegal, and indefensible; that the judicial procedure offered as a means of reparation for an international injury is inherently defective for the purpose; and that in many cases jurisdiction is asserted in violation of the law of nations. The United States, therefore, cannot submit to the curtailment of its neutral rights by these measures, which are admittedly retaliatory, and therefore illegal, in conception and in nature, and intended to punish the enemies of Great Britain for alleged illegalities on their part. The United States might not be in a position to object to them if its interest and the interests of all neutrals were unaffected by them, but, being affected, it cannot with complacence suffer further subordination of its rights and interests to the plea that the exceptional geographic position of the enemies of Great Britain require or justify oppressive and illegal practices." [64]

The strength of neutral protests had small effect and neutral pressure may be said to have modified retaliatory policy only insofar as German hesitancy to adopt unlimited submarine warfare can be traced to the Imperial Government's appreciation of the force of American opposition.

Retaliatory Decrees in the Courts

The fate of the retaliatory decrees in the prize courts was but little affected by the difference in practice between Continental and Anglo-American courts. Continental prize courts, regarding themselves bound first and foremost to apply municipal law, whether of legislative or executive origin, accepted the retaliatory decrees and enforced them without concern for their consistency with international law.[65] In the *Almazora,* for example, the Conseil des Prises blandly conceded that the retaliatory decree of March 13, 1915, was in conflict with international law as embodied in the Declaration of Paris and proceeded to enforce the former with no more ado or explanation. The Court held "Le fait que des marchandises ennemies qui ne sont pas contrabande de guerre se trouvaient à bord d'un navire neutre, et ainsi bénéficiaient de la règle de la déclaration de Paris . . . que le pavil-

64. *Ibid.,* 1915, Supplement, p. 589. 65. Garner, *Prize Law,* p. 197.

lon neutre couvre la marchandise ennemie à l'exception de la contrabande de guerre, ne fait pas obstacle à l'application à ces marchandises de l'article 1er du décret pris par la France le 13 Mars 1915 en vertu duquel toutes marchandises appartenant à des sujets de l'Empire d'Allemagne ou venant d'Allemagne ou expédiées vers l'Allemagne doivent être arrêtés." [66]

The German Courts' attitude toward the sinking of merchant ships without warning, search, or attempt to capture, as provided in the retaliatory decree of February, 1915, is an interesting example of complete abdication by prize tribunals. The competence of the prize courts, they held, was established and limited by municipal law and German prize law dealt with the sinking of ships only after capture as prize and in certain well-defined cases, that is when the ship in question was an enemy vessel or assimilable thereto, when it carried contraband, violated a blockade, or performed unneutral service. "Si la destruction d'un navire de commerce a lieu pour un autre motif et sans que le navire soit saisi comme prise, elle constitue bien un acte de guerre, mais n'est pas une mesure du droit de prise. En conséquence, les tribunaux de prise n'ont pas à examiner sa légalité. . . ." The destruction of a ship because of its presence in a zone declared forbidden by German ordinance "ne rentre pas sous la notion d'un acte du droit de prise. C'est une mesure de guerre prescrite à côté et en dehors de l'ordonnance des prises, mesure sur la légalité de laquelle, dans un cas déterminé, les tribuneaux de prises n'ont pas à se prononcer." [67]

British prize tribunals, on the other hand, are regarded as courts of international law and, in their interpretation of their obligations under that law and its reconciliation with their obligations under municipal law, they drew subtle distinctions between the enforcement of legislative and executive acts.[68] In consequence, all the ingenuity of the courts was exercised to prove that the municipal law in question

66. 27 *R.G.D.I.P.* (1920), p. 72.

67. *The Eemland & Gaasterland*, Paul Fauchille et Charles de Visscher, *Jurisprudence Allemande en Matière de Prises Maritimes* (Paris, 1922), pp. 296–298; cf. also *The Gertruida, ibid.*, pp. 228, 229.

68. "The fact . . . that the Prize Courts in this country would be bound by acts of the imperial legislature affords no grounds for arguing that they are bound by the executive orders of the King in Council." *The Zamora, Lloyds Reports*, vol. IV, p. 91; cf. Garner, *Prize Law*, pp. 185–188.

was in accord with international law although the result for the neutral shipper was strikingly similar to what it would have been in a continental court.

In 1811 Lord Stowell had declared that under the British Constitution "the king in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce." [69] Given this ruling, a neutral attempt to question either the justification of retaliatory measures, or the methods employed in their pursuit, was bound to be unsuccessful in the British prize courts. In 1916, however, this doctrine was rejected in the *Zamora* by Lord Parker who said, "The idea that the King in Council, or indeed any branch of the executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our Constitution." But until there has been a decision of the Prize Court to that effect no executive order may be presumed to be contrary to law and the court "will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law." Applying this, "an order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case." [70]

Lord Parker's dictum had three implications—first, that the decision of the executive that reprisals were necessary would be accepted as correct both in law and in fact; second, that the Court would not question the legality of the measures employed in reprisal, except, and this is the third implication, when such reprisals could be regarded as causing unreasonable inconvenience to neutrals. This last point, the only one that held out any hope at all for the neutrals, was fully discussed by Lord Sumner in the *Stigstad*.

69. *The Fox, Foreign Relations of the United States*, vol. III, p. 418.
70. *Lloyds Reports*, vol. IV, p. 97.

Following the dictum in the *Zamora,* the crucial question in a case dealing directly with the retaliatory orders was not, as the Court pointed out, the belligerent's right to retaliate but "the claim of neutrals to be saved harmless." The existence of German breaches of law justifying retaliatory measures was established by the Order itself and "the only question open to neutral claimants for the purpose of invalidating the Order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances." The seas have been established as the highway of all on which belligerent and neutral exercise concurrent rights and "the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence." The inconvenience caused to neutrals must be considered not only in relation to the acts of retaliation but also to their cause. "In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves." The right of retaliation is a principle "now too firmly established to be open to doubt." To confine the belligerent's right to interfere with neutral trade when pursuing a retaliatory policy to that which he enjoys already under the heads of contraband, blockade, and unneutral service "is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect. . . ." [71]

The decision in the *Stigstad,* followed by the shifting of the burden of proof in the question of inconvenience to the shipper,[72] was adequate

71. *The Stigstad, ibid.,* vol. V, p. 395.

72. *The Leonora, ibid.,* vol. VII, p. 364: "On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted . . . it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts, and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for, the matter being one of degree, it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to

to demonstrate that no retaliatory order was likely to be found illegal on the basis of the inconvenience that it caused to neutrals. In these decisions the Court, in reality, extended an established belligerent right to interfere with neutral trade under certain conditions and regulations to the sphere of retaliation, inherent in which is the absence of condition and regulation. In the application of blockade or contraband rules, the neutral was protected by standards established under international law but in the application of retaliatory rules no protection whatsoever was available other than a vague standard of "excessive inconvenience" interpreted by a belligerent prize court in terms of its government's estimate of the necessities of the situation.

Motives of the Retaliatory Acts

The motives of a retaliatory policy may be expected to have important effects on the nature of the measures chosen to carry it out. If a measure described as retaliatory is actually inspired by a desire to put an end to the illegal acts of the enemy, one may expect to find that the reprisals adopted, having as their aim the elimination of the wrong complained of, will be limited measures suitable to the achievement of that end and ceasing when it is accomplished. If, on the other hand, reprisals are adopted as but the excuse for the inauguration of some long contemplated policy of an illegal but probably effective character, the tendency will be to make hasty charges of enemy illegality and to proceed to measures out of all proportion to the crimes complained of, such measures being intended not merely to force the enemy to cease his violation of the law but also, by the use of some weapon not ordinarily sanctioned by international law, to ensure his defeat.

The most illuminating British comments with regard to the motives of the "blockade" undertaken in the name of reprisal are to be found in the post war writings of those concerned in their enforcement. Lord Cecil in an introductory chapter to *The Great Experiment* describes the activities for which he was responsible in the war years. "A very large part of the work," he says, "concerned the so-called blockade.

show that the risk and inconvenience in any particular class of cases were not excessive."

It was really much more than a blockade. It was the organization of all sorts of economic and commercial pressure on our enemies. The chief object was to deprive Germany and her allies of all imports essential for carrying on the war. . . ." [73] For some four pages, Cecil describes the policies employed in the "so-called blockade," those which were justified by an extension of prize law to meet the new circumstances of war as well as those which had their origin ostensibly as reprisals for Germany's illegal conduct. Nowhere in this recital does Cecil mention retaliation nor seek justification for the acts he describes as anything but essential weapons in the defeat of Germany.

Sir Edward Grey, in describing the blockade policy, similarly emphasizes it as an absolute essential in the defeat of Germany and in his discussion neither the submarine nor the mine-laying campaigns are mentioned. Such restraint as was imposed upon blockade measures stemmed not from considerations of legality but from a desire to avoid a break with the United States. Although the "blockade of Germany was essential to the victory of the Allies, . . . the ill-will of the United States meant their certain defeat. . . . The object of diplomacy, therefore, was to secure the maximum of blockade that could be enforced without a rupture with the United States." [74]

The effect of the German order of February 4 in making it possible for Britain to blockade Germany completely without losing the friendship of America is described by W. Arnold-Foster, Admiralty representative on the Contraband Committee from 1914 to 1916, member of the Black List and Main Licensing Committees, and the Restriction of Enemy Supplies Department. "One immediate result of the German announcement was that the British were able, in the general outburst of anger which ensued, to produce the famous Reprisals Order in Council of 11 March, 1915, without too much anxiety as to its effect upon neutral opinion. As a reprisal for the German move they now claimed—and could well claim—justification for such guarded relaxations of the legal code as would enable them to *prevent their enemy's commerce*, without danger to life at sea, and without extending the principle of confiscation of property as prize." [75] The em-

73. Robert Cecil, *A Great Experiment* (New York, 1941), p. 40.
74. Edward Grey, *Twenty-Five Years* (London, 1925), vol. II, p. 103.
75. W. Arnold Forster, *The Blockade 1914–1919* (Oxford, 1939), p. 16.

phasis in this statement is obvious. The March reprisals order, although deriving from a situation justifying reprisals, was primarily intended as a major weapon in the policy of economic warfare on which Great Britain was already embarked.

The German submarine campaign against merchant vessels, inaugurated as a retaliatory measure in February, 1915, was discussed by naval leaders in 1914 and in November of that year the Leaders of the Fleet wrote to Admiral von Pohl, Chief of the Naval Staff, recommending unlimited submarine warfare. "As England is trying to destroy our trade it is only fair if we retaliate by carrying on the campaign against her trade by all possible means. Further, as England completely disregards International Law in her actions, there is not the least reason why we should exercise any restraint in our conduct of the war. We can wound England most severely by injuring her trade. By means of the U-boat we should be able to inflict the greatest injury . . . The gravity of the situation demands that we should free ourselves from all scruples which certainly no longer have justification. It is of importance too, with a view to the future, that we should make the enemy realize at once what a powerful weapon we possess in the U-boat with which to injure their trade, and that the most unsparing use is to be made of it." [76]

In the discussion which followed the declaration of February 4 and which revolved around the need to come to a decision as to the extent of the submarine campaign and its effects on neutrals, the retaliatory argument originally stressed by the Leaders of the Fleet was lost to view and chief consideration was given to the U-boat campaign as the essential weapon in a German victory. As the proponents of unrestricted submarine warfare analyzed the situation in a session at General Headquarters in March, 1916, the military picture, although favorable to Germany, could not be expected to become decisively so. Economic conditions, on the other hand, were not only unfavorable to Germany but in this sphere the enemy could last much longer. Germany's strategy, therefore, must be to bring the war to a rapid end and this was to be done through the U-boat campaign.[77] The inevitably unfavor-

76. R. von Scheer, *Germany's High Sea Fleet in the World War* (London, 1920), pp. 222, 223.

77. *Ibid.*, p. 220.

able reaction of the United States, however, being an important factor, the decision was repeatedly postponed until the Pless Conference of January, 1917.

The decision to enforce the unrestricted U-boat campaign was strongly influenced by the arguments of Chief of Staff Admiral von Holtzendorff who estimated that through its adoption England could be forced to succumb within five months. If, on the other hand, he argued, the decision were not made, the war would end in the exhaustion of all parties and consequently in disaster for Germany. As a result of the limited submarine war which was being waged in December, 1916, when von Holtzendorff submitted his memorandum one fifth of all British shipping was lost. This von Holtzendorff admitted would eventually have a very serious effect on British supplies. "But I think it out of the question that . . . England could thereby be forced to make peace, especially as the . . . effects of the shortage of fats, wood and iron ore and the continued influence on the supply of munitions would not come into play at all. Further, the psychological effects of panic and fear would be lacking. These, which can only result from unrestricted U-boat warfare, I hold to be the indispensable conditions of success. . . ." [78]

The influence of von Holtzendorff's thinking was apparent in Bethmann Hollweg's statement at the crucial Pless Conference. "The decision to embark on the unrestricted U-boat campaign is . . . dependent on the results we expect from it. Admiral von Holtzendorff offers us the prospect that we shall have England at our mercy by the next harvest. The experiences of the U-boats in recent months, the increased number of boats, the bad economic situation of England certainly form a re-enforcement for luck. Taking it all round the prospects of the unrestricted submarine campaign are very favorable. . . . We must be quite clear that, judging by the military situation, great military blows are scarcely likely to bring us to final victory. The U-boat campaign is the 'last card.' " [79]

The parallel between the use of retaliation in the Napoleonic Wars and its employment in World War I is striking. In both cases the con-

78. *Ibid.*, pp. 248–251.

79. E. Ludendorff, *The General Staff and its Problems* (London, 1920), vol. I, p. 305.

tending belligerents were quick to realize that victory could not be achieved in the clash of armed forces by land or sea. War on commerce was essential and since war on commerce must be waged at the expense of neutrals, justification was required for belligerent disregard of neutral rights. In both cases, this justification was found in the doctrine of retaliation which the belligerents interpreted as releasing them from their obligations toward neutrals and freeing them to adopt whatever methods of commercial warfare they found most effective.

Conclusions

THERE HAS been no important instance of peacetime retaliation since 1923. Available material on practice in World War II, however, indicates that in this conflict belligerent practice with regard to naval retaliation was roughly parellel to the practice adopted in World War I and that neutrals, as in the past, objected to the employment of retaliatory measures that operated to restrict neutral rights.[1] It would

1. Material on belligerent practice and neutral protests has been presented in Green H. Hackworth, *Digest of International Law* (Washington, D.C., 1943), vol. VII, pp. 134–156. Retaliatory measures cited are the British Order in Council of November, 1939, similar to that of March, 1915; the British Order in Council of July, 1940, similar to that of February, 1917; and the German Order of August, 1940, similar to the Proclamation of February, 1917. Allied mining of Norwegian waters in 1940 was also justified on retaliatory grounds. It is interesting to note that in the trial at Nuremberg of Admirals Doenitz and Raeder the defense does not appear to have sought justification on retaliatory grounds against the accusation brought by the prosecution that the methods used by Germany in conducting submarine warfare and in establishing operational zones were in violation of international law. On the contrary, the essence of the German contention at the trial was that these measures had been rendered internationally legal by changed conditions of warfare. Insofar as this contention applied to the sinking without warning of belligerent armed merchant vessels, it appears to have been accepted by the court. It was rejected, however, with regard to the sinking of neutral ships in operational zones.

The court's final statement on submarine warfare nevertheless seemed to indicate that retaliatory considerations entered into the decision if not into the arguments of the defendants. The court declared: "In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8 May 1940 according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare." *Official Transcript of the International Military Tribunal, passim;* International Military Tribunal (Nuremberg), Judgment and Sentences, 41 *AJIL* 1 (January, 1947), p. 305. See also G. G. FitzMaurice, "Some Aspects of Modern Contraband Control and the Law of Prize," 22 *B.Y.I.L.* (1945), pp. 85–89.

seem evident, therefore, despite a lapse, brief enough in historic perspective, in the employment of peacetime reprisals, that the doctrine of retaliation is not without significance for the future relations of states. Two questions regarding these future relations may be raised on the basis of the developments studied here as well as those that have occurred in the general fields of international law and relations. What is the potential role of the doctrine of retaliation in an international community operating under the provisions of the Charter of the United Nations? What is the potential role of the doctrine of retaliation in naval warfare should the Charter of the United Nations fail to prevent the outbreak of another armed conflict?

Examined in their best light, in terms of their legal justification and theoretical purposes and not in terms of political motivation, the reprisals studied here were an attempt at law enforcement in the international community. That many of the reprisals analyzed in this study represented abuse of a legal doctrine to gain ends quite extraneous to the enforcement of international law does not detract from the principle that there must be some means to enforce that law and if the international community cannot supply the means they will be sought on a unilateral basis. The ease with which the doctrine of retaliation may be abused and the fact that it has, in actuality, been abused extensively does, however, raise the question as to whether the doctrine in application makes a contribution to the maintenance of law and order sufficiently great to outweigh its potentialities for abuse.

The Problem of Peacetime Retaliation

Although sometimes abused for ulterior ends, it must be said of peacetime retaliation that it has, for the most part, been put to the use for which it was designed. With some important exceptions, the theoretical and actual aims of peacetime reprisals have been the same—securing the cessation of an internationally illegal practice and obtaining compensation for the damage the employment of the practice in question has involved. Leaving aside the question of whether in many cases the employment of retaliation might not have been avoided had the aggrieved power been willing to resort to one or another of the available means of peaceful settlement, where modern public reprisals

are most to be criticized is in their methods rather than their aims.

As has been pointed out in the body of this study, the doctrine of proportionality, which on the whole operated effectively in the case of private reprisals, was of little effect in determining the nature of the measures undertaken in the name of public reprisals. Order in the international community is undoubtedly prejudiced by the existence of a situation in which an aggrieved state is the judge in its own case. In medieval and early modern times this disadvantage was somewhat mitigated by the fact that the wrongs which reprisals were generally authorized to correct were of a fairly uniform and measurable nature. As the pecuniary basis for reprisals became engulfed in other claims and as reprisals ceased to be an attempt to secure satisfaction for a private individual in fairly specific terms, so the uniformity with which reprisals were enforced diminished and their capacity for abuse increased.

The modern retaliating state has thus not only been the judge of whether it has been wronged but also has been free to determine the nature and extent of the penalty. In addition, the widening of the gap in modern times between great powers and small has affected the degree to which states have been held in check in their application of reprisals by a fear of counter reprisals. This fear which was probably of considerable significance in keeping private reprisals within fairly narrow grounds has practically disappeared as the result of the wide disproportion in strength which has generally obtained between the modern retaliating state and the object of its actions.

It might well be concluded that since peacetime retaliation, despite abuses, has served as a means of law enforcement, regulation of the methods employed rather than abandonment of the general principle might promote the observance of law in the international community. As Charles Fenwick has pointed out with regard to intervention, however, "Even where the results are good the use of force by the individual state must inevitably weaken the general structure of order and justice in the international community." [2] This principle is reflected in the United Nations Charter which seeks to eliminate rather than regulate the unilateral use of force. Instead of speculating as to the precise

2. Charles G. Fenwick, "Intervention: Individual and Collective," 39 *AJIL* 4 (October, 1945), p. 658.

measures by which public reprisals might be regulated, therefore, it becomes more pertinent to enquire whether the Charter permits retaliation at all, either intentionally or by ommission.

Public Reprisals and the Charter

Article I of the Charter defines as among the purposes of the United Nations "To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . ." Article II binds the members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered [and to] refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Chapter VI binds the parties to a dispute to seek peaceful means of settlement and provides various means whereby the Security Council may investigate the dispute and facilitate its settlement. Chapter VII provides for the punitive action to be taken by the Security Council "with respect to threats to the peace, breaches of the peace, and acts of aggression."

Self-defense against an armed attack "until the Security Council has taken the measures necessary to maintain international peace and security . . ." is the only unilateral use of force specifically authorized by the Charter. Logically, therefore, unless it has been directed to take such measures by the Security Council acting under Chapter VII, the individual state loses the right to embark on acts of force short of war on the grounds that a prior illegality has been committed by another state (except in self defense as defined). Thus, in a sense, the right to determine when an illegal action has occurred and to decide on and direct the methods of punishment is transferred from the individual state to the Security Council which becomes itself the author of reprisals. Under this reasoning the position of the Security Council, in the absence of an international police force, becomes somewhat analogous to that of the ruler who authorized his subject to take private re-

prisals but regulated the means by which they might be carried out. Such assimilation of retaliation to the provisions of the Charter, moreover, may be of some advantage in strengthening the position of the Security Council with regard to states not actually involved in the action taken in view of the precedents earlier established by the acquiescence of third states in measures undertaken on retaliatory grounds which limited or affected their rights.

Since the provisions of the Charter are by no means entirely clear, however, and since they will have to be interpreted in the light of existing situations and political realities, it is probably premature to assume even that the states signatory to the Charter by accepting it in general have agreed in particular that they no longer possess the right of retaliation. Rather it would seem advisable to examine the Charter to determine what questions regarding peacetime retaliation it leaves unanswered.

It is the aim of the Charter to bring about the peaceful settlement of international disputes or failing this to prevent the unilateral adoption of measures of force. It would be unjust to say, however, that the aim of the Covenant was less comprehensive. As the Corfu Incident has shown, mere paper provisions for settlement will not, in themselves, suffice to eradicate reprisals if the will to enforce such provisions is absent. The Charter, however, does appear to provide a more satisfactory basis for the handling of a reprisal case than did the Covenant. The latter with its emphasis on war or threats of war made it possible for Italy to erect a legally arguable case upon its essentially political aims. The Charter is concerned less specifically with war and more generally with threats to or breaches of the peace and does, therefore, at least narrow the range within which legalistic obfuscation is possible. Nevertheless there exist gaps in the Charter, as there did in the Covenant, which might make it possible for a state to embark upon retaliatory measures and pursue them unscathed.

With regard to definition of terms, the question arises as to whether a reprisal, ostensibly undertaken for no other purpose than to secure justice which would otherwise be denied, is a use of force "inconsistent with the Purposes of the United Nations" or not "in the common interest." It might indeed be argued in certain cases that the reprisal in question not only served to rectify the wrong done to the retaliating

power but also served to advance the purposes of the United Nations.

It would, of course, be for the Security Council, under Chapter VI to call upon the parties to the dispute to settle by peaceful means before the situation developed to a point where the adoption of a retaliatory policy was threatened. But in order for the Council to take this step there must be unanimity among the permanent members [3] and it is not difficult to envisage a situation in which this unanimity could not be achieved. The same problems apply, of course, to any other of the Security Council functions with regard to international disputes envisaged in Chapter VI: investigation; recommendation of appropriate procedures or methods of adjustment; and recommendation of terms of settlement. The failure of the Council to act under Chapter VI as the result of a veto by a permanent member might eventually lead to a situation in which one party to the dispute would proceed to reprisals against the other. Under these circumstances it would seem very likely that the failure of unanimity under Chapter VI would be repeated when efforts were made to have the Council take action under the much more drastic provisions of Chapter VII.[4]

Should the potentially retaliating power be itself a permanent member of the Council the unanimity requirement would be of less weight in decisions under Chapter VI since, when these decisions are made, parties to a dispute must refrain from voting. Were a permanent member actually to resort to measures of retaliation, however, action under Chapter VII would be barred by the unanimity requirement.

Despite the obvious gaps in the Charter, however,—and academic anticipation of legal loopholes is generally far outdistanced in actual practice—the Statute of the International Court of Justice provides a further basis for the subordination of reprisals, as distinct from other unilateral acts of force short of war, to orderly international processes.

As has been pointed out elsewhere in this paper a state embarking upon a retaliatory policy, whatever its motives, must at least pay lip-service to international law by claiming that its actions are a response

3. Subject always to the exception that in decisions under Chapter VI a party to the dispute may not vote.

4. In theory the same situation might obtain without the exercise of the great power veto if the five permanent members, having agreed upon a course of action, were unable to secure the support of two non-permanent members. Actual development of such a situation seems unlikely, however.

to a prior violation of that law. This very emphasis on the legal nature of the dispute brings the whole question of peacetime retaliation much more clearly within the jurisdiction of the International Court of Justice than are other acts of force short of war. States that have made declarations under Article 36 of the Statute of the International Court of Justice [5] have accepted, with various reservations regarding questions of domestic jurisprudence and other matters, the compulsory jurisdiction of the Court "in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation."

Many of the disputes which have given rise to public reprisals in the past have fallen under the relatively specific categories set forth in clauses a, c, and d of Article 36. In addition, the broad terms of clause b coupled with the requirement that for a normally illegal act to be justified on retaliatory grounds it must itself be a response to a prior illegality might well justify the conclusion that as between states party to Article 36, which do not choose to adopt other means of peaceful settlement, most if not all of the disputes of the type which have hitherto given rise to reprisals must be submitted to the International Court. Under such circumstances the occasion for reprisals could not arise unless the offending state failed to carry out the award of the court, an eventuality rendered less likely by the general tendency of states to accept the findings of a court once they have submitted to its jurisdiction. Thus for purposes of limiting as opposed to abolishing peacetime retaliation, as wide an extension as possible of acceptance of the optional clause would at least allow for the judicial determination of the question as to whether grounds for retaliation exist and would probably reduce the occasions on which unilateral acts of force could plausibly be employed on retaliatory grounds.[6] That states which have bound themselves by Article 36 and regard themselves as aggrieved

5. Or under Article 36 of the Statute of the Permanent Court of International Justice.

6. An excellent example of resort to judicial settlement in a situation resembling many in the past that had led to reprisals is the submission to the International Court of Justice of the dispute between Great Britain and Albania over the sinking of British ships in Corfu Channel in October, 1946.

might abandon the retaliatory argument and seek other justification for a unilateral act of force is, of course, all too possible; it is not, however, a problem with which this paper is concerned.

The Problem of Retaliation in Naval War

In the Napoleonic Wars and in World War I the doctrine of retaliation was employed by the belligerents not, as was claimed, to punish or bring an end to the illegal actions of their opponents but to justify a resort to measures of war which were either illegal or which, because of their revolutionary character, occupied a rather dubious position under international law. Belligerent naval retaliation, moreover, differed from its peacetime counterpart not only in its motives but also in the drastic modifications that it inevitably produced in the position of neutrals. The latter, despite the logic of their argument that a state which had been wronged was not in consequence justified in violating the rights of others, were on the whole unable to maintain the rights they claimed.

Definitive judgments as to the role of the doctrine of retaliation in World War II cannot, of course, be made until a greater volume of evidence is available than is now the case. Existing evidence would appear to indicate that World War II practice was markedly similar to that of World War I and it may be inferred without excessive cynicism that similar practices were produced by similar motives. Within the limitations established by incomplete data, certain anticipations with regard to future practice suggest themselves as worthy of consideration on the basis of experiences in the three major conflicts of the nineteenth and twentieth centuries.

Past experience would seem to show that in general the rules of war are best observed when the advantages accruing from their observance are about equal on both sides. Thus the rules of war have on the whole operated successfully to protect prisoners of war. But when a belligerent has reason to believe that, by reinterpreting or flouting the rules of war, it can utilize its geographic position or some new technical development in such a way as to gain a decisive advantage, then the rules are likely to be disregarded whether on retaliatory or other grounds.

Although there may be moral objections to changing or reinterpreting the rules after the game has started, the weight of experience leads to the belief that this is exactly what will be done especially when scientific changes have outdistanced developments in the laws of war.

A number of the laws of naval war that have operated to protect neutrals during conflicts fairly limited in scope appear, judging by the experience of the last three major conflicts, to be unacceptable to belligerents in wars in which most of the major powers are engaged and in which the neutral community is correspondingly weak. The efforts now being made to rid the world of war may lead one to hope that in the predictable future the problem of wartime retaliation may not arise again. If, however, war is to be accepted as a normal condition in international relations and one, therefore, that should be regulated by laws that, because they offer more or less equal advantages to both sides, have some expectations of surviving a major conflict, the experience of three world wars would point to the necessity of both a drastic revision of the laws of naval war and the institution of an international prize court that would place international law above national. But even the alteration of the laws of naval war along lines that might at any given time be expected to prove more acceptable to the belligerents in some future major conflict does not obviate the possibility that once again the belligerents will find themselves in a situation where flouting the law offers advantages so great as to outweigh the normal desire to act with the support of the law to such an extent at least that the law will be appealed to only for purposes of justifying the setting aside of particular restrictions.

Even in the event that the postwar settlement succeeds in doing away with large scale international conflicts, retaliation may be of some pertinence in a situation where the Security Council seeks to take action under Article VII. Under such circumstances the question might well arise as to whether the Security Council in taking action against a lawbreaking state might be justified in using weapons or methods declared illegal as employed between states at war. The case is a highly hypothetical one and the dangers of generalizing from municipal to international systems are not inconsiderable. It may be argued, however, that just as the municipal laws which govern the conduct of the

police force in the performance of its law enforcement duties are in themselves a safeguard of national law and order, so international law and order may be best served if the representatives of the international community allow themselves in such instances to be bound by the same rules that bind them as individual states.

Bibliography

Primary Sources

A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers relating to Peace and War. 3 vols. London, 1732.

Académie des Sciences Morales et Politiques. *Collection des Ordonnances des Rois de France.* 10 vols. Paris, 1887–1908.

Acts of the Privy Council of England, 1542–1604. New Series. 32 vols. London, 1890–1907.

Acts of the Privy Council of England, 1613–1626. 9 vols. London, 1921–1938.

An Abstract of the Evidence Lately Taken in the House of Commons against the Orders in Council. London, 1812.

Ballard, Adolphus. *British Borough Charters, 1042–1216.* Cambridge, 1913.

—— and Tait, James. *British Borough Charters, 1216–1317.* Cambridge, 1923.

Bateson, Mary. *Borough Customs.* Vol. I. Publications of the Selden Society, Vol. XVII. London, 1905.

de Bernis, Cardinal François Joachim de Pierre. *Memoirs and Letters.* Boston, 1902.

Birch, Thomas. *A Collection of the State Papers of John Thurloe, Esq.* 7 vols. London, 1742.

Bland, A. E., Brown, P. A., and Tawney, R. H. *English Economic History: Select Documents.* London, 1914.

de Boislisle, Jean. *Memoriaux du Conseil de 1661.* 3 vols. Société de l'Histoire de France, 1905–1907.

Browning, Oscar. *The Journal of Sir George Rooke.* Navy Records Society, 1897.

Butler, G. G. *The Edmondes Papers.* London, 1913.

Carnegie Endowment for International Peace. *Official German Documents Relating to the World War.* New York, 1923.

Champollion-Figeac, M. *Lettres de Rois, Reines, et Autres Personnages des Cours de France et d'Angleterre.* 2 vols. Paris, 1839.

Chance, James Frederick. *British Diplomatic Instructions, 1689–1789.* Vol. I. Sweden, 1689–1727. London, 1922.

Colbert, Jean Baptiste. *Lettres, Instructions, et Memoires.* 7 vols. in 9. Paris, 1861–1873.

Corbett, Julian S. *Papers Relating to the Navy During the Spanish War, 1585–1587.* Navy Records Society, 1898.

Déak, Francis and Jessup, Philip C. *A Collection of Neutrality Laws, Regulations and Treaties.* 2 vols. Washington, D.C., 1939.

Dodson, John. *Reports of Cases Argued and Determined in the High Court of Admiralty.* 2 vols. London, 1815.

Douais, C. *Lettres de Charles IX à M. de Fourquevaux Ambassadeur en Espagne, 1565–1572.* Paris, 1897.

Dumont, Jean. *Corps Universel Diplomatique du Droit des Gens.* 8 vols. Amsterdam, 1726–1731.

Edwards, Thomas. *Reports of Cases Argued and Determined in the High Courts of Admiralty.* New York, 1815.

d'Estrades, Comte Godefroi. *Lettres, Memoires, et Negociations.* 9 vols. London, 1743.

Fanshaw, Richard. *Original Letters During his Embassies in Spain and Portugal.* London, 1701.

France, La Commission des Archives Diplomatiques au Ministère des Affaires Étrangères. *Recueil des Instructions données aux Ambassadeurs et Ministres de France, 1648–1789.* 24 vols. in 25. Paris, 1884–1929.

France, Ministère des Affaires Étrangères. *Documents Diplomatiques Turquie, 1900–1901.* Paris, 1902.

France, Ministry of Foreign Affairs. Diplomatic Correspondence. *Reply of the French Government to the Note of the British Government of August 11, 1923 Relating to Reparations.* Paris, 1923.

Gairdner, James. *Letters and Papers Illustrative of the Reigns of Richard III and Henry VII.* 2 vols. Rerum Britannicarum Mediievi Scriptores, No. 24. London, 1861, 1863.

Gilliodts-Van Severen, M. L. *Le Cotton Manuscrit Galba B. I.* Brussels, 1896.

Great Britain. *British and Foreign State Papers.* London, 1815–

Great Britain, Public Record Office. *Calendar of the Close Rolls Preserved in the Public Record Office.*

Edward	I	1272–1279	1 vol.	London, 1900
Edward	III	1327–1346	7 vols.	" , 1896–1904
Richard	II	1381–1399	5 vols.	" , 1920–1927
Henry	IV	1399–1413	4 vols.	" , 1927–1938
Henry	V	1413–1422	2 vols.	" , 1929–1932
Henry	VI	1422–1447	4 vols.	" , 1933–1937

—— *Calendar of Letters, Despatches and State Papers Relating to the Negotiations between England and Spain, 1485–1553.* 11 vols. London, 1862–1916.

—— *Calendar of Letters and State Papers Relating to the Negotiations Between England and Spain Preserved in the Archives at Simancas and Elsewhere.* London, 1866.

—— *Calendar of Letters and State Papers Relating to English Affairs Preserved Principally in the Archives of Simancas, 1568–1603.* 3 vols. London, 1894–1899.

—— *Calendar of the Patent Rolls Preserved in the Public Record Office.*

Edward	III	1350–1354	1 vol.	London, 1907
		1361–1377	5 vols.	" , 1912–1916
Richard	II	1381–1399	5 vols.	" , 1897–1909
Henry	IV	1399–1413	4 vols.	" , 1903–1909
Henry	V	1413–1422	2 vols.	" , 1910–1911
Edward	IV	1476–1485	1 vol.	" , 1901
Edward	V			
Richard	III			
Henry	VII	1485–1509	2 vols.	" , 1914–1916
Edward	VI	1547–1553	5 vols.	" , 1924–1929
Philip and Mary		1553–1558	4 vols.	" , 1937–1939
Elizabeth		1558–1560	1 vol.	" , 1939

—— *Calendar of the State Papers Domestic Series.*

Edward VI, Mary, Elizabeth	1547–1580	4 vols. London,	1856
Elizabeth	1581–1603	6 vols.	1865–1870
James I	1603–1625	5 vols.	1857–1872
Charles I	1625–1649	23 vols.	1858–1897
Commonwealth	1649–1659	12 vols.	1867–1885
Charles II	1660–1685	15 vols.	1860–1938
William and Mary	1689–1700	5 vols.	1895–1937
Anne	1700–1704	2 vols.	1924–1937

—— *Calendar of the State Papers Foreign Series.*

Edward VI	1547–1553	1 vol. London,	1861
Mary	1553–1558	1 vol. " ,	1861
Elizabeth	1558–1588	25 vols. " ,	1863–1931

—— *Calendar of State Papers and Manuscripts Existing in the Archives and Collections of Milan, 1385–1618.* London, 1912.

—— *Calendar of State Papers and Manuscripts Existing in the Archives and Collections of Venice and in Other Libraries of North Italy, 1202–1672.* 37 vols. London, 1864–1939.

Gross, Charles. *Select Cases Concerning the Law Merchant, 1270–1638.* Vol. I, *Local Courts.* Selden Society, Vol. XXIII. London, 1908.

Hansard. *Parliamentary Debates.* 1803–

Hall, Hubert. *Select Cases Concerning the Law Merchant, 1239–1633.* Vol. II, *Central Courts.* Selden Society, Vol. XLVI. London, 1930.

—— *Select Cases Concerning the Law Merchant.* Vol. III, *Supplementary Central Courts.* Selden Society, Vol. XLIX. London, 1932.

Haynes, Samuel, and Murdin, William. *A Collection of State Papers 1542–1570 Left by William Cecill Lord Burghley.* London, 1740, 1749.

Historical Manuscripts Commission. *Report on the Manuscripts of the Duke of Buccleuch and Queensberry Preserved at Montagu House, Whitehall.* London, 1903.

—— *Report on the Manuscripts of the Marquess of Downshire Preserved at Easthampstead Park, Berks.* 3 vols. London, 1924–1938.

—— *Report on the Manuscripts of J. B. Fortescue Esq. Preserved at Dropmore.* 10 vols. London, 1892–1927.

—— *Report on the Manuscripts of Lord Polwarth Preserved at Mertoun House, Berwickshire.* 2 vols. London, 1911.

The Manuscripts of His Grace the Duke of Portland Preserved at Walbeck Abbey. London, 1891.

Institute of International Affairs. *The German Treaty-Text.* London, 1920.

Kaulek, Jean. *Correspondance Politique de MM. de Castillon et de Marillac.* Paris, 1885.

Laffleur de Kermaingant, P. *Lettres de Henri W au Comte de la Rochepot.* Paris, 1889.

—— *Mission de Jean de Thumery Sieur de Boissise (1598–1602).* Paris, 1886.

Leadam, I. S., and Baldwin, J. F. *Select Cases Before the King's Council, 1243–1482.* Selden Society, Vol. XXXV. Cambridge (Mass.), 1918.

League of Nations. *Official Journal, 1923.* Geneva, 1923.

—— *Reports and Resolutions on the Subject of Article 16 of the Covenant.* Document A 14 1927 V. Geneva, 1937.

Lefèvre-Pontalis, Germain. *Correspondance Politique de Odet de Selve-Ambassadeur de France en Angleterre, 1546–1549.* Inventaire Analytique des Archives du Ministère des Affaires Étrangères. Paris, 1888.

Lloyds' Reports of Prize Cases. 10 vols. London, 1915–1924.

Maitland, F. W. *Select Pleas in Manorial and other Seignorial Courts.* 2 vols. Selden Society. London, 1889.

Malden, Henry Elliot. *The Cely Papers.* Royal Historical Society. Camden Series. London, 1900.

Marsden, Reginald G. *Documents Relating to the Law and Custom of the Sea.* 2 vols. London, 1915.

—— *Select Pleas in the Court of Admiralty.* 2 vols. Selden Society, Vols. VI, XI. London, 1892, 1897.

Mas Latrie, M. L. de. *Traités de Paix et de Commerce et Documents Divers Concernant Les Relations des Chrétiens avec Les Arabes de L'Afrique Septentrionale au Moyen Age.* Paris, 1865.

Minutes of Evidence Taken at the Bar of the House of Lords to Whom it was Referred to Consider the Orders in Council. London, 1808.

Moore, John Bassett. *History and Digest of the International Arbitra-*

tions to Which the United States Has Been a Party. 6 vols. Washington, 1898.

—— *International Adjudications Ancient and Modern.* Modern Series, Vol. V. New York, 1933.

Negociation du Mareschal de Bassompierre en Angleterre. Cologne, *1668.*

Ogle, Octavius. *Copy Book of Sir Amias Poulet's Letters.* London, 1866.

Ordonnance touchant la Marine de Louis XIV Roy de France et de Navarre. Paris, 1681.

Pardessus, J. M. *Collection des Lois Maritimes.* Vol. IV. Paris, 1837.

Permanent Court of Arbitration, The Hague. *The Venezuelan Arbitration Before the Hague Tribunal.* Washington, D.C., 1905.

Piggott, Francis Taylor, and Omond, G. W. T. *Documentary History of the Armed Neutralities, 1780–1800.* London, 1919.

Ralston, Jackson H. *Venezuelan Arbitrations of 1903.* 58th Congress, 2nd Session, Senate Document 316, Washington, 1904.

Rathery, E. J. B. *Journal et Mémoires du Marquis d'Argenson.* Vol. 9. La Société de l'Histoire de France. Paris, 1867.

Recueil des Décisions des Tribunaux Arbitraux Mixtes. Vols. 7, 8. Paris, 1928, 1929.

Robinson, Christopher. *Reports of Cases Argued and Determined in the High Courts of Admiralty.* 6 vols. London, 1808.

Roscoe, E. S. *Reports of Prize Cases Determined in the High Court of Admiralty, 1745–1859.* 2 vols. London, 1905.

Sawyer, Edmund. *Memorials of Affairs of State in the Reigns of Queen Elizabeth and King James I Collected Chiefly from the Original Papers of Ralph Winwood.* 3 vols. London, 1725.

Scott, James Brown. *The Armed Neutralities of 1780 and 1800.* Carnegie Endowment for International Peace. New York, 1918.

—— *The Controversy Over Neutral Rights Between the United States and France, 1797–1800.* Carnegie Endowment for International Peace. New York, 1918.

—— *The Hague Conventions and Declarations of 1899 and 1907.* Carnegie Endowment for International Peace. New York, 1918.

—— *The Hague Peace Conferences of 1899 and 1907.* 2 vols. Carnegie Endowment for International Peace. Baltimore, 1909.

—— *The Hague Court Reports.* First Series. New York, 1916.

—— *Resolutions of the Institute of International Law.* Carnegie Endowment for International Peace. New York, 1916.

Spont, Alfred. *Letters and Papers Relating to the War with France, 1512–1513.* Publications of the Navy Record Society, Vol. X. 1897.

Strahan, A. *Notifications, Orders, and Instructions, relating to Prize Subjects, during the Present War.* London, 1809.

Tawney, R. H., and Power, E. *Tudor Economic Documents.* Vol. II. *Commerce, Finance and the Poor Law.* London, 1924.

Thierry, Augustin. *Recueil des Monuments Inédits de l'Histoire du Tiers État.* Vol. I. Collection de Documents Inédits sur l'Histoire de France. Paris, 1850.

Tuelay, Alexandre, and Lacaille, Henri. *Journal de Clément de Faquemberge Greffier du parlement de Paris, 1417–1435.* 3 vols. Société de l'Histoire de France. Paris, 1903.

United States, Department of State. *Papers Relating to the Foreign Relations of the United States.* Annual, Washington, D.C.

United States, Navy Department. *Naval Documents Relating to the Quasi-War Between the United States and France.* Vol. I. Washington, 1935.

United States, War Department. *Basic Field Manual.* Vol. VII. *Military Law.* Part 2. *Rules of Land Warfare.* Washington, 1934.

Viard, Jules. *Documents Parisiens du Règne de Philippe VI de Valois.* 2 vols. Paris, 1899.

Waldegrave, James, Earl of. *Memoirs from 1754 to 1758.* London, 1821.

Winbolt, S. E. *England and Napoleon.* Bell's English History Source Books, Vol. 14. London, 1912.

Secondary Sources—Books

Adams, Henry. *History of the United States during the Administration of Jefferson and Madison.* 9 vols. New York, 1890.

Arnold-Forster, W. *The Blockade, 1914–1919.* Oxford Pamphlets on World Affairs, No. 17. Oxford, 1939.

Ayala, Balthazar. *De Jure et Officiis Bellicis et Disciplina Militari.* Translated by J. Westlake. Baltimore, 1912.

Azuni, M. D. A. *The Maritime Law of Europe.* 2 vols. New York, 1806.

Baker, J. R., and Crocker, H. G. *The Laws of Land Warfare.* Washington, 1919.

Barès, Charles. *Le Blocus Pacifique.* Toulouse, 1898.

Baring, Alexander. *An Inquiry into the Causes and Consequences of the Orders in Council.* London, 1808.

Baty, T., and Morgan, A. H. *War: Its Conduct and Legal Results.* London, 1915.

Belli, Pierino. *De Re Militari et Bello Tractatus.* Translated by Herbert C. Nutting. London, 1936.

Bemis, Samuel Flagg. *A Diplomatic History of the United States.* New York, 1936.

Bourne, H. R. F. *English Seamen under the Tudors.* 2 vols. London, 1868.

Briggs, Herbert W. *The Doctrine of Continuous Voyage.* Baltimore, 1926.

Brierly, J. L. *The Outlook for International Law.* Oxford, 1944.

Butler G., and Maccoby, S. *The Development of International Law.* London, 1928.

van Bynkershoek, Cornelius. *Quaestionum Juris Publici Libri Duo.* Translated by Frank Tenny. London, 1930.

Calvo, Charles. *Le Droit International Théorique et Pratique.* 5th ed. 6 vols. Paris, 1896.

Cecil, Robert. *A Great Experiment.* New York, 1941–

Chance, James Frederick. *George I and the Northern War.* London, 1909.

Clark, G. N. *The Dutch Alliance and the War against French Trade, 1688–1697.* Manchester, 1923.

Clark, J. Reuben. *The Right to Protect Citizens by Landing Forces.* Washington, 1929.

Clark, Ruth. *Sir William Trumbull in Paris, 1685–1686.* Cambridge, 1938.

Cobbett, William. *The Parliamentary History of England From the Earliest Period to the Year 1803.* 36 vols. London, 1806.

Conn, Stetson. *Gibraltar in British Diplomacy in the Eighteenth Century.* New Haven, 1942.

Coquelle, P. *L'Alliance Franco-Hollandaise Contre L'Angleterre, 1735–1788.* Paris, 1902.

Corbett, Julian S. *England in the Seven Years War.* 2 vols. London, 1907.

Corbett, Thomas. *An Account of the Expedition of the British Fleet to Sicily.* London, 1739.

Cunningham, Audrey. *British Credit in the Last Napoleonic War.* Cambridge, 1910.

Cunningham, W. *The Growth of English Industry and Commerce.* 2 vols. 5th ed. Cambridge, 1927.

Cussy, Ferdinand de. *Phases et Causes Célèbres du Droit Maritimes des Nations.* 2 vols. Leipzig, 1856.

Ducrocq, Louis. *Représailles en Temps de Paix.* Paris, 1901.

Dareste, Rodolphe. *Nouvelle Études D'Histoire du Droit.* Paris, 1902.

Falcke, Horst P. *Le Blocus Pacifique.* Leipzig. 1919.

Fauchille, Paul. *La Diplomatic Française et la Ligue des Neutres de 1780.* Paris, 1893.

Fauchille, Paul, and de Visscher, Charles. *Jurisprudence Allemande en Matière de Prises Maritimes.* Paris, 1922.

Feiling, K. G. *British Foreign Policy, 1660–1672.* London, 1930.

Freeman, Alwyn W. *The International Responsibility of States for Denial of Justice.* New York, 1938.

Garner, James Wilford. *Prize Law During the World War.* New York, 1927.

Garner, James Wilford. *International Law and the World War.* 2 vols. New York, 1920.

Gedye, G. E. R. *The Revolver Republic.* London, 1930.

Gentile, Alberico. *De Jure Belli Libri Tres.* Translated by John C. Rolfe. Oxford, 1933.

von Gortz, Johann Eustach. *The Secret History of the Armed Neutrality.* London, 1792.

Gross, Charles. *The Gild Merchant.* Oxford, 1890.

Grotius, Hugo. *De Jure Belli ac Pacis.* Translated by F. W. Kelsey. Oxford, 1925.

Guichard, Louis. *The Naval Blockade.* New York, 1930.

Gwatkin, H. M., and Whitney, J. P. (eds.). *The Cambridge Medieval History*. 8 vols. Cambridge, 1911–1936.

Hackworth, Green H., *Digest of International Law*, Washington, D.C., 1940–1943.

Hall, William Edward. *A Treatise on International Law*. 4th ed. London, 1895.

van den Haute, Gabryelle. *Les Relations Anglo-Hollandaises au début du XVIII^e Siècle*. Louvain, 1932.

Heath, Phoebe Ann. *Napoleon I and the Origins of the Anglo-American War of 1812*. Toulouse, 1929.

Heckscher, Eli F. *The Continental System: An Economic Interpretation*. Oxford, 1922.

Hindmarsh, A. E. *Force in Peace*. Cambridge (Mass.), 1933.

Hogan, Albert E. *Pacific Blockade*. Oxford, 1908.

Holdsworth, W. S. *A History of English Law*. Vol. V. London, 1924.

Huvelin, P. *Essai Historique sur le Droit des Marchés et des Foires*. Paris, 1897.

Hyneman, Charles S. *The First American Neutrality*. Urbana (Ill.), 1934.

Hyde, Charles Cheney. *International Law Chiefly as Interpreted and Applied by the United States*. 1st Ed. Boston, 1922, 2nd Ed. Boston, 1945.

Jessup, Philip C. *Elihu Root*. 2 vols. New York, 1938.

—— and Déak, Francis. *Neutrality: Its History, Economics, and Law*. Vol. I. *The Origins*. New York, 1936.

Kelsen, Hans. *Peace Through Law*. Chapel Hill, 1944.

King, Wilson. *Chronicles of Three Free Cities—Hamburg, Bremen, Lübeck*. London, 1914.

Kulsrud, Carl J. *Maritime Neutrality to 1780*. Boston, 1936.

Lacour-Gayet, G. *La Marine Militaire de la France sous Le Règne de Louis XV*. Paris, 1910.

da Legnano, Giovanni. *Tractatus de Bello, de Represaliis et de Duello*. Translated by J. L. Brierly. Oxford, 1917.

Lichtenberger, Henri. *The Ruhr Conflict*. Washington, 1923.

Lipson, Ephraim. *The Economic History of England*. Vol. I. *The Middle Ages*. London, 1937.

Lloyd, G. A. *Egypt since Cromer*. 2 vols. London, 1933.

Lowie, Robert H. *Primitive Society.* New York, 1920.

Ludendorff, Erich. *The General Staff and its Problems.* 2 vols. London, 1920.

Mahan, A. T. *The Influence of Sea Power upon the French Revolution and Empire.* 2 vols. Boston, 1892.

—— *The Influence of Sea Power upon History.* Boston, 1898.

Malcolm-Smith, Elizabeth F. *British Diplomacy in the Eighteenth Century.* London, 1937.

de Martens, Georg Friedrich. *An Essay on Privateers, Captures and Particularly on Recaptures.* London, 1801.

de Mas Latrie, René. *Du Droit de Marque ou Droit de Représailles au Moyen-Age.* Paris, 1875.

de Maulde-la-Clavière, M. A. R. *Le Diplomatie au Temps de Machiavel.* Vol. I. Paris, 1892.

Melvin, F. E. *Napoleon's Navigation System.* New York, 1919.

Mitchell, W. *An Essay on the Early History of the Law Merchant.* Cambridge, 1904.

Molloy, Charles. *De Jure Maritimo et Navali.* London, 1676.

Moore, John Bassett. *A Digest of International Law.* Vol. VII. Washington, 1906.

—— *International Law and Some Current Illusions.* New York, 1924.

Muret, Pierre. *La Prépondérance Anglaise (1715–1763).* Paris, 1937.

Murray, K. M. E. *The Constitutional History of the Cinque Ports.* Manchester, 1935.

Nys, Ernest. *Le Droit International: Les Principes, Les Théories, Les Faits.* Vol. III. Brussels, 1906.

—— *Les Origines du Droit International.* Paris, 1894.

Offut, Milton. *The Protection of Citizens Abroad by the Armed Forces of the United States.* Baltimore, 1928.

Oppenheim, L. *International Law.* 2nd Ed. London, 1912.

Oppenheim, M. *A History of the Administration of the Royal Navy and of Merchant Shipping in Relation to the Navy.* London, 1896.

Pajol, C. P. V. *Les Guerres sous Louis XV.* Vol. IV. Paris, 1885.

Phillips, W. Alison and Reede, Arthur H. *Neutrality: Its History, Economics and Law.* Vol. II. *The Napoleonic Period.* New York, 1936.

Phillipson, Coleman. *The International Law and Custom of Ancient Greece and Rome.* 2 vols. London, 1911.

Piggott, Francis Taylor. *The Freedom of the Seas.* London, 1920.

de Pistoye, Alphonse, and Duverdy, Charles. *Traité des Prises Maritimes.* 2 vols. Paris, 1885.

Pollock, F., and Maitland, F. W. *The History of English Law Before the Time of Edward I.* 2 vols. 2nd ed. Cambridge, 1923.

Prestage, Edgar (ed.). *Chapters in Anglo-Portuguese Relations.* Watford (Herts.), 1935.

Prevost-Parodel, M. *Elisabeth et Henri IV, 1595–1598.* Paris, 1863.

Research in International Law, Harvard Law School. *Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners.* Special Supplement, 23 *AJIL* (1929).

—— *Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War.* Special Supplement, 33 *AJIL* (1939).

Rippy, J. Fred. *The United States and Mexico.* New York, 1926.

de la Roncière, Charles. *Histoire de la Marine Française.* Vols. IV, V. Paris, 1910.

Sanborn, Frederic R. *Origins of the Early English Maritime and Commercial Law.* New York, 1930.

Satow, Ernest. *The Silesian Loan and Frederick the Great.* Oxford, 1915.

Scheer, R. *Germany's High Sea Fleet in the World War.* London, 1920.

Sears, Louis Martin. *Jefferson and the Embargo.* Durham (S.C.), 1927.

Sereni, Angelo P. *The Italian Conception of International Law.* New York, 1943.

Stark, Francis R. *The Abolition of Privateering and the Declaration of Paris.* New York, 1897.

Stryienski, Casimir. *The Eighteenth Century in France.* New York, n.d.

Tansill, Charles C. *America Goes to War.* Boston, 1938.

Teyssaire, Jean. *Le Blocus Pacifique.* Beauvais, 1910.

Thomas, Charles Marion. *American Neutrality in 1793.* New York, 1931.

von Tirpitz, Alfred Peter Friedrich. *My Memoirs.* 2 vols. London, 1919.

Toynbee, Arnold J. *Survey of International Affairs, 1920–1923.* London, 1925.

Turlington, Edgar. *Neutrality: Its History, Economics and Law.* Vol. III. *The World War Period.* New York, 1936.

de Vattell, E. *Le Droit des Gens.* Translated by C. G. Fenwick. Washington, 1916.

de Victoria, Franciscus. *De Indis et de Ivre Belli Reflectiones.* Translated by J. P. Bate. Washington, 1917.

Walpole, Horace. *Memoirs of the Last Ten Years of the Reign of George II.* 2 vols. London, 1822.

Ward, A. W., Prothero, G. W., and Leathes, S. (eds.). *The Cambridge Modern History.* 14 vols. New York, 1903–1912.

Watson, Robert. *The History of the Reign of Philip the Third.* New York, 1818.

Wavell, A. P. *Allenby in Egypt.* London, 1943.

Westlake, J. *Collected Papers on Public International Law.* Cambridge, 1914.

—— *International Law.* 2nd Ed. Cambridge, 1913.

Williams, Basil. *Stanhope: A Study in Eighteenth Century War and Diplomacy.* Oxford, 1932.

Williamson, James. *The Age of Drake.* London, 1938.

Wilson, Arthur M. *French Foreign Policy During the Administration of Cardinal Fleury, 1726–1743.* Cambridge (Mass.), 1936.

Wolff, Christian. *Jus Gentium Methodo Scientifica Pertractatum.* Translated by J. H. Drake. Oxford, 1934.

Woolf, C. N. S. *Bartolus of Sassoferrato.* Cambridge, 1913.

Wynne, William. *The Life of Sir Leoline Jenkins.* London, 1724.

Zouche, Richard. *Juris et Judicii Fecialis sive, Juris Inter Gentes, et Quaestiondum de Eodum Explicatio.* Translated by J. L. Brierly. Baltimore, 1911.

Secondary Sources—Articles

Allemés, Frederick. "The Legality or Illegality of the Ruhr Occupation." 10 *Transactions of the Grotius Society* (1925).

Basdevant, Jules. "L'Action Coercitive Anglo-Germano-Italienne

Contre le Vénézuéla," 11 *Revue Générale de Droit International Public* (1904).

Baty, Thomas. "The Supposed Chaos in the Law of Nations," 63 *University of Pennsylvania Law Review* (1915).

Bemis, S. F. "The United States and the Abortive Armed Neutrality of 1794," 26 *American Historical Review* 1 (October, 1918).

Borchard, Edwin. "The Place of Law and Courts in International Relations," 37 *American Journal of International Law* 1, (Jan., 1943).

Borchard, Edwin. "Reprisals on Private Property," 30 *American Journal of International Law* (1936).

de la Brière, Yves. "Évolution de la Doctrine et de la Pratique en Matière de Représailles," Académie de Droit International, 22 *Recueil des Cours* (1928).

Brierly, J. L. "International Law and Resort to Armed Force," 4 *Cambridge Law Journal* (1932).

Brown, A. R. Radcliffe. "Primitive Law," *The Encyclopedia of Social Sciences,* Vol. IX.

von Bulmerincq, August. "Le Blocus Pacifique et ses effets sur la Propriété Privée," 11 *Journal du Droit International Privé* (1884).

Clark, Grover. "The English Practice with Regard to Reprisals by Private Persons," 27 *American Journal of International Law* (1933).

Corbett, P. E. "World Order—An Agenda for Lawyers," 37 *American Journal of International Law* 2 (1943).

Eagleton, Clyde. "The Jurisdiction of the Security Council Over Disputes," 40 *American Journal of International Law* 3 (1946).

Fenwick, Charles G. "Intervention: Individual and Collective," 39 *American Journal of International Law* 4 (1945).

FitzMaurice, G. G. "Some Aspects of Modern Contraband Control and the Law of Prize," 22 *British Yearbook of International Law* (1945).

Gardiner, D. A. "Belligerent Rights on the High Seas in the Fourteenth Century," 48 *Law Quarterly Review* (1932).

Geffcken, F. H. "La France en Chine et le Droit International," 17 *Revue de Droit International* (1885).

Giraud, M. "Memorandum on Pacific Blockade up to the Time of the

Foundation of the League of Nations," *League of Nations Official Journal* (1927), Appendix II.

Goebel, Julius. "The International Responsibility of States for Injuries sustained by Aliens on account of Mob Violence, Insurrections, and Civil War." 8 *American Journal of International Law* (1914).

Hill, David Jayne. "The Janina Corfu Affair," 18 *American Journal of International Law* (1924).

Hindmarsh, Albert E. "Self-Help in Time of Peace," 26 *American Journal of International Law* (1932).

Jessup, Philip C. "The United States and Treaties for the Avoidance of War," *International Conciliation*, No. 239 (April, 1928).

Kelsen, Hans. "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals," 39 *American Journal of International Law* 1 (1945).

Maccoby, Simon. "Reprisals as a Measure of Redress Short of War," 2 *Cambridge Law Journal* (1928).

McNair, Arnold D. "The Legal Meaning of War and the Relation of War to Reprisals," *Transactions of the Grotius Society* (1925).

——"The Legality of the Occupation of the Ruhr," 5 *British Yearbook of International Law* (1924).

"Mediation in Mexico," Editorial Comment, 8 *American Journal of International Law* (1914).

Moncharville, M. "Le Conflit Franco-Turc de 1901," 19 *Revue Générale de Droit International Public* (1902).

Nurick, Lester. "The Distinction Between Combatant and Noncombatant in the Law of War," 39 *American Journal of International Law* 4 (1945).

Politis, N. "Les Représailles entre États membres de la Société des Nations," 31 *Revue Générale de Droit International Public* (1924).

Schuster, E. J. "The Legality or Illegality of the Ruhr Occupation," 10 *Transactions of the Grotius Society* (1925).

Schwarzenberger, Georg. "Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law," 37 *American Journal of International Law* 3 (1943).

Spiegal, Hans W. "Origin and Development of Denial of Justice," 32 *American Journal of International Law* (1938).

Stockder, Archibald H. "The Legality of the Blockades Instituted

by Napoleon and the British Orders in Council," 10 *American Journal of International Law* (1916).

Strupp, Karl. "L'Incident de Janina Entre La Grèce et L'Italie," 31 *Revue Générale de Droit International Public* (1924).

de Visscher, Charles. "Le Conflit Anglo-Égyptien et La Société des Nations," 51 *Revue de Droit International et de Législation Comparée* (1924).

—— "L'Interprétation du Pacte au lendemain du différend Italo-Grec," 51 *Revue de Droit International et de Législation Comparée* (1924).

Index